
SUPPLEMENTAL MATERIAL
MARCH 17, 2004
CITY COMMISSION MEETING

SUPPLEMENTAL MATERIAL

C7 - Resolutions

- C7F A Resolution Approving And Authorizing The Mayor And City Clerk To Execute A Second Amendment To The Interim Management Agreement With Professional Course Management II, LTD. To Provide Professional Services For The Management And Operation Of The City's Normandy Shores Golf Course; Said Amendment Providing For An Extension Of The Term Of The Agreement From April 30, 2004 (As Previously Amended), To April 30, 2005, At Which Time The City Anticipates Closing The Normandy Shores Golf Course For Reconstruction.

(Parks & Recreation)
(Resolution)

R5 - Ordinances

- R5B An Ordinance Amending The Code Of The City Of Miami Beach, By Amending Chapter 118, "Administration And Review Procedures," Article II, "Boards," Division 5, "Board Of Adjustment," Section 118-131, "Membership," Amending The Membership Of The Board Of Adjustment To Conform To The Recently Adopted Charter Amendment Expanding The Board From Five To Seven Regular Voting Members And Removing Ex-Officio Members From The Board; And Section 118-136, "Powers And Duties," Amending The Voting Requirement To Approve Matters Coming Before The Board From 4/5 To 5/7; Providing For Repealer, Severability, Codification And An Effective Date.

(Planning Department)
(Revised Ordinance)

R7 - Resolutions

R7D Concession Agreements With The Market Company, Inc.

1. A Resolution Approving And Authorizing The Mayor And City Clerk To Execute A Concession Agreement By And Between The City Of Miami Beach And The Market Company, Inc., For The Management And Operation Of A Street Market In That Portion Of The Espanola Way Public Right-Of-Way, Between Washington Avenue And Drexel Avenue; Said Agreement Having An Initial Term Of One (1) Year, Commencing On April 1, 2004, And Expiring On March 31, 2005, With An Option To Renew, At The City's Sole Discretion, For An Additional One Year Term, Subject To The Terms Provided In The Agreement.
2. A Resolution Approving And Authorizing The Mayor And City Clerk To Execute A Concession Agreement By And Between The City Of Miami Beach And The Market Company, Inc., For The Management And Operation Of A Green Market In That Portion Of The Lincoln Road Public Right-Of-Way, Between Drexel Avenue And Lenox Avenue; Said Agreement Having An Initial Term Of One (1) Year, Commencing On April 1, 2004, And Expiring On March 31, 2005, With An Option To Renew, At The City's Sole Discretion, For An Additional One Year Term, Subject To The Terms Provided In The Agreement.
3. A Resolution Approving And Authorizing The Mayor And City Clerk To Execute A Concession Agreement By And Between The City Of Miami Beach And The Market Company, Inc., For The Management And Operation Of A Street Market In That Portion Of The Rue Vendome Public Right-Of-Way, Between 71st Street And Normandy Drive; Said Agreement Having An Initial Term Of One (1) Year, Commencing On April 1, 2004, And Expiring On March 31, 2005, With An Option To Renew, At The City's Sole Discretion, For An Additional One Year Term, Subject To The Terms Provided In The Agreement.

(Economic Development)

(Memorandum, Resolutions and Agreements)

R9 - New Business and Commission Requests

R9F Discussion Regarding A Resolution Approving And Authorizing The City Manager To Execute A Second Amendment To The "Amended 1996 Interlocal," (As Said Term Is Defined In The Second Amendment) Between Miami-Dade County And The City Of Miami Beach.

(City Manager's Office)

(Resolution)

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A SECOND AMENDMENT TO THE INTERIM MANAGEMENT AGREEMENT WITH PROFESSIONAL COURSE MANAGEMENT II, LTD. TO PROVIDE PROFESSIONAL SERVICES FOR THE MANAGEMENT AND OPERATION OF THE CITY'S NORMANDY SHORES GOLF COURSE; SAID AMENDMENT PROVIDING FOR AN EXTENSION OF THE TERM OF THE AGREEMENT FROM APRIL 30, 2004 (AS PREVIOUSLY AMENDED), TO APRIL 30, 2005, AT WHICH TIME THE CITY ANTICIPATES CLOSING THE NORMANDY SHORES GOLF COURSE FOR RECONSTRUCTION.

WHEREAS, on November 25, 2003, the Mayor and City Commission approved a First Amendment to the Interim Management Agreement with Professional Course Management II, Ltd. (PCM), extending the term of the Agreement for Provision of the Professional Services for the Management and Operation of the City's Normandy Shores Golf Course from September 30, 2003 to April 30, 2004; and

WHEREAS, at the time the Interim Agreement was amended it was anticipated the Normandy Shores Golf Course would be closing for renovations in the Spring of 2004, dependent upon the identification of additional funding needed to complete the construction; and

WHEREAS, as the extended term provided under the First Amendment is nearing conclusion, there are funding and construction issues still pending resolution before the Normandy Shores Golf Course can be closed for construction; and

WHEREAS, it is presently anticipated these pending issues will require an additional year to resolve; and

WHEREAS, PCM II has agreed to again extend the term of the Interim Agreement, for an additional 12 month period, concluding on April 30, 2005, under the same terms and conditions that are currently in effect; and

WHEREAS, the Administration recommends the Normandy Shores Golf Course remain open for our residents until such time as the construction is ready to proceed; and

WHEREAS, the City of Miami Beach Golf Advisory Board unanimously recommended approval of the attached Second Amendment at its meeting of March 2, 2004.

Agenda Item C7F
Date 3-17-04

NOW, THEREFORE, BE IT DULY RESOLVED THAT THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH that the Mayor and City Commission approve and authorize the Mayor and City Clerk to execute a Second Amendment to the Interim Management Agreement with Professional Course Management II, Ltd., to provide professional services for the management and operation of the City's Normandy Shores Golf Course; said Amendment extending the term to April 30, 2005, at which time the City anticipates closing the Normandy Shores Golf Course for planned construction/ renovations.

PASSED and ADOPTED this _____ day of _____ 2004.

MAYOR

ATTEST:

CITY CLERK

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Reso._Ammendment

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**

M. J. O'Neil 3-12-04
City Attorney Date

**SECOND AMENDMENT TO THE INTERIM MANAGEMENT AGREEMENT FOR
THE CITY OF MIAMI BEACH NORMANDY SHORES GOLF COURSE BETWEEN
THE CITY OF MIAMI BEACH AND PROFESSIONAL COURSE MANAGEMENT II
LTD.**

This Second Amendment to that certain Agreement, dated September 5, 2001, and effective October 1, 2001, between the City of Miami Beach, Florida ("City"), and Professional Course Management II Ltd. ("PCM II"), to Provide Professional Services for the Management of the City's Normandy Shores Golf Course (the "Agreement"), and as amended on November 25, 2003 (the "First Amendment"), is entered into this _____ day of _____, 2004 (the "Second Amendment").

RECITALS

WHEREAS, the City currently has an Agreement with PCM II for professional services for the management of the City's Normandy Shores Course, as amended by the First Amendment, and effective through April 30, 2004, or until closure of Normandy Shores Golf Course for planned construction/renovations, which ever is first; and

WHEREAS, due to the delay relative to the closure of the Normandy Shores Golf Course and the additional costs associated with such delay, a portion of which have been borne by PCM II, the City and PCM II have realized that amendments to certain terms and conditions of the Agreement are necessary; said amendment(s) extending the term of the Agreement through April 30, 2005; and

WHEREAS, the Second Amendment, as set forth below, is in the best interest of the City and PCM II for a continued relationship between the parties and for PCM II to continue to provide the exceptional level of service expected by the City;

NOW THEREFORE, in consideration for the mutual covenants and promises provided herein and which are part of the Agreement, the parties herein agree to amend the Agreement as follows:

1. Section 3 of the Agreement entitled "TERM", is hereby amended to read as follows:

The Term of this Agreement shall begin on October 1, 2001 and conclude on April 30, 2004
~~2005, or immediately upon the closure of Normandy Shores Golf Course for planned~~

~~construction/renovations, which ever is first~~, including a cancellation clause upon sixty (60) days written notice to PCM II for convenience and without cause, to be exercised at the will of the City, if deemed in the best interest of the City, subject to the City's rights to terminate same pursuant to Section 15 of the Agreement.

2. Section 4 of the Agreement entitle "RENT", is hereby amended to read as follows:

In consideration of the City executing this Agreement, and granting the rights provided in this Agreement, PCM II shall pay the City \$6,000 per month, or a total of \$72,000 annually. If after the closure of the Bayshore Golf Course there is a 20% increase in the number of rounds of golf played at the Normandy Shores Golf Course (over a base annual number of 45,000 rounds and a monthly allocation as broken down in Attachment "Exhibit A") the monthly payment will increase from \$6,000 to \$9,000 for the month. In consideration for PCM II continuing to provide professional golf course management services through April 30, 2004 2005, ~~or until the closure of Normandy Shores Golf Course for planned construction/renovations, which ever is first~~, the parties agree that, commencing retroactively on May 1, 2003, and continuing through the end of the term of this Agreement, the City shall abate all future rent due as provided for in the Agreement. Notwithstanding the aforestated rent abatement, all the other terms and conditions of the Agreement, as amended herein, shall continue to apply.

3. Section 12.3 of the Agreement entitled "Personal Property" and found under Section 12 entitled "ALTERATIONS, MAINTENANCE, AND REPAIRS", is hereby amended to read as follows:

At the commencement of this Agreement the City will purchase or lease the necessary golf course maintenance equipment, as mutually agreed upon by both parties, for Normandy Shores Golf Course, and as shall offered and incorporated herein as Exhibit A. PCM II, will pay the City for approximately 75% of the annual cost of this maintenance equipment expense. Said payment should be submitted at the time the rent payment is made. PCM II will be responsible for the maintenance and proper operation of all equipment, to ensure that all warranties and guarantees remain in effect. It is further understood that this golf course maintenance equipment

will be relocated to the Bayshore Golf Course when it reopens, and at that time the 100% of the cost for the lease/ purchase will be the responsibility of the City. A list of City provided golf course equipment included in the Agreement for use by PCM II during the term hereof, is attached and incorporated herein as Exhibit D. PCM II shall maintain all City-owned equipment at its sole cost and all equipment such other equipment as may be necessary to maintain the Premises in a condition which satisfies those maintenance standards set forth in Exhibit C. The City shall have the right to periodically take an inventory of any or all equipment on the Premises. In consideration for PCM II continuing to provide professional golf course management services through September 30, 2004 2005, ~~or until the closure of Normandy Shores Golf Course for planned construction/renovations, which ever is first~~, the parties agree that, commencing retroactively on May 1, 2003, and continuing through the end of the term of this Agreement, PCM II shall have no responsibility to pay the City for approximately 75% of the annual cost of this maintenance equipment expense, and the City shall assume all such costs. Notwithstanding the aforesated waiver of responsibility for equipment maintenance costs, all the other terms and conditions of the Agreement, as amended herein, shall continue to apply.

The parties further acknowledge that if deemed necessary, PCM II will be responsible to supplement the maintenance equipment through either the direct lease or purchase by PCM II of any equipment not included in Exhibit D, to be used for the operation and maintenance of the Premises.

4. Section 1.1 of the Agreement entitled "Real Property" and found under Section 1 entitled "PREMISES TO BE MANAGED", is hereby amended to read as follows:

Those certain City owned golf course commonly known as:

- a. Normandy Shores Golf Course, 2401 Biarritz Drive (excluding sanitary sewage area)

Together with all buildings, improvements and fixtures located thereon.

In consideration for PCM II continuing to provide professional golf course management services through April 30, 2004 2005, ~~or until the closure of Normandy Shores Golf Course for planned construction/renovations, which ever is first~~, the parties agree that commencing retroactively on

May 1, 2003, and continuing through the term of this Agreement, the terms and conditions of this Agreement shall not apply to, and PCM II shall not provide professional services for, the Par 3 Golf Course, 2795 Prairie Avenue, and the City shall assume management responsibility for that Golf Course. Notwithstanding the aforestated release of duty to provide services for the Par 3 Golf Course, all the other terms and conditions of the Agreement, as amended herein, shall continue to apply.

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IN WITNESS WHEREOF, the parties have caused this First Amendment to be executed by their duly authorized officers and representatives as of the day and year first above written, as a sealed instrument.

ATTEST:

CITY OF MIAMI BEACH

CITY CLERK

BY: _____
MAYOR

ATTEST:

PROFESSIONAL COURSE MANAGEMENT II,
LTD. (PCM II)


SECRETARY

(CORPORATE SEAL)

BY: _____
JOHNNY LA PONZINA
PRESIDENT

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**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**

 3-12-04
City Attorney Date

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**CITY OF MIAMI BEACH
CITY ATTORNEY'S OFFICE**

TO: Jorge M. Gonzalez
City Manager

FROM: Murray H. Dubbin
City Attorney



DATE: March 15, 2004

SUBJECT: R 5 B – Page 212 – Membership of Board – Note Correction

Attached is the redraft of the Board of Adjustment amendatory ordinance (Agenda Item R 5 B), redrafted for clarity purposes at the suggestion of Commissioner Steinberg.

This should be substituted for consideration Wednesday.

MHD:lm

cc: Commissioner Richard Steinberg
Gary Held, First Assistant City Attorney
Jorge Gomez, Planning Director

Agenda Item R5B
Date 3-17-04

ORDINANCE NO. _____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING THE CODE OF THE CITY OF MIAMI BEACH, BY AMENDING CHAPTER 118, "ADMINISTRATION AND REVIEW PROCEDURES," ARTICLE II, "BOARDS," DIVISION 5, "BOARD OF ADJUSTMENT," SECTION 118-131, "MEMBERSHIP", AMENDING THE MEMBERSHIP OF THE BOARD OF ADJUSTMENT TO CONFORM TO THE RECENTLY ADOPTED CHARTER AMENDMENT EXPANDING THE BOARD FROM FIVE TO SEVEN REGULAR VOTING MEMBERS AND REMOVING EX-OFFICIO MEMBERS FROM THE BOARD; AND SECTION 118-136, "POWERS AND DUTIES," AMENDING THE VOTING REQUIREMENT TO APPROVE MATTERS COMING BEFORE THE BOARD FROM 4/5 TO 5/7; PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION AND AN EFFECTIVE DATE.

WHEREAS, the Charter Review Committee recommended that the City Charter be amended to change the composition of the Board of Adjustment; and

WHEREAS, the City Commission placed the question for voter consideration; and

WHEREAS, on November 4, 2003 the voters approved the above amendment to the Charter; and

WHEREAS, this ordinance amendment is required in order to effectuate the recently amended Special Related Acts of the City Charter.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA

SECTION 1. That Section 118-131 "Membership," is hereby amended as follows:

The Board of Adjustment shall be ~~comprised~~ composed of ~~five~~ seven voting members, and ~~two ex-officio members.~~ ~~The two ex-officio members shall not have voting privileges and their presence shall not be counted for the determination of a quorum. The ex-officio members are the planning and zoning director and public services director. The remaining five~~ The seven voting members shall consist of two citizens at large and five chosen from among the following categories (one per category), namely: one from each of the following categories and two citizens at large. Members shall consist of the following: One member shall be appointed from each of the following professions or callings: Law, architecture, engineering, real estate development, certified public accounting, financial consultation and general business. The members representing the professions of law, architecture, engineering and public accounting shall be duly licensed by the state; the member representing general business shall be of responsible standing in the community. Members shall be appointed for a term of one year by a five-sevenths vote of the city commission. Members of the board must be either residents of or have their principal place of business in the city.

SECTION 2. That Section 118-136, "Powers and duties," is hereby amended as follows:

(a) The board of adjustment shall have the following powers and duties:

- (1) To hear and decide appeals when it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of these land development regulations with the exception of appeals pursuant to section 118-197 and section 118-262. In the event of an administrative appeal to the board of adjustment, the planning and zoning director may engage the services of an attorney for the purpose of representing the administrative officer who made the decision that is the subject of the appeal.

In exercising this power, the board of adjustment, may upon appeal, reverse or affirm, wholly or partly, the order, requirement, decision, or determination, and to that end shall have all the powers of the officer from whom the appeal is taken. The concurring vote of ~~four~~ five members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official or to decide in favor of the applicant on any matter upon which the board is required to pass under these land development regulations.

- (2) To authorize, upon application such variance from the terms of these land development regulations as will not be contrary to the public interest when, owing to special conditions, a literal enforcement of a provision of these land development regulations would result in unnecessary and undue hardship. An affirmative vote of 5/7ths of all members of the board shall be necessary to approve any variance request.

(b) The board of adjustment shall serve as the city's floodplain management board and shall have the authority to exercise all powers and perform all duties assigned to such board pursuant to section 54-31 et seq. and Resolution No. 93-20698, and in accordance with the procedures set forth therein as such ordinance and resolution may be amended from time to time.

SECTION 3. REPEALER.

All ordinances or parts of ordinances and all section and parts of sections in conflict herewith be and the same are hereby repealed.

SECTION 4. CODIFICATION.

It is the intention of the City Commission, and it is hereby ordained that the provisions of this ordinance shall become and be made part of the Code of the City of Miami Beach as amended; that the sections of this ordinance may be renumbered or relettered to accomplish such intention; and that the word "ordinance" may be changed to "section" or other appropriate word.

SECTION 5. SEVERABILITY.

If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

SECTION 6. EFFECTIVE DATE.

This Ordinance shall take effect ten days following adoption.

PASSED and **ADOPTED** this _____ day of _____, 2003.

ATTEST:

MAYOR

CITY CLERK

APPROVED AS TO
FORM AND LANGUAGE
& FOR EXECUTION

W. J. Sullivan 3-15-04
City Attorney Date

First Reading:

Second Reading:

Verified by: _____

Jorge G. Gomez, AICP
Planning Director

Underscore denotes new language

~~Strikethrough~~ denotes deleted language

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**CITY OF MIAMI BEACH
COMMISSION ITEM SUMMARY**



Condensed Title:

A Resolution Approving A Concession Agreement Between The City And The Market Company, Inc., For The Operation Of A Street Market On Espanola Way, Between Washington and Drexel Avenues, With An Initial Term Of One Year (April 1, 2004 to March 31, 2005), With An Option To Renew, At The City's Sole Discretion, For An Additional One Year Term.

A Resolution Approving A Concession Agreement Between The City And The Market Company, Inc., For The Operation Of A Green Market On Lincoln Road, Between Lenox and Drexel Avenues, With An Initial Term Of One Year (April 1, 2004 to March 31, 2005), With An Option To Renew, At The City's Sole Discretion, For An Additional One Year Term.

A Resolution Approving A Concession Agreement Between The City And The Market Company, Inc., For The Operation Of A Street Market On Rue Vendome, Between 71st Street and Normandy Drive, With An Initial Term Of One Year (April 1, 2004 to March 31, 2005), With An Option To Renew, At The City's Sole Discretion, For An Additional One Year Term.

Issue:

Shall the Mayor and City Commission approve the Agreements with the Market Company for; 1) Espanola Way Street Market; 2) Lincoln Road Green Market; and 3) Normandy Village Street Market?

Item Summary/Recommendation:

On July 31, 2002, the Mayor and City Commission approved the issuance of RFP 57-01/02 for the operation and management of a green market on Lincoln Road, a street-market on Espanola Way, and a street-market on Rue Vendome. Said RFP was issued, and proposals received, and after an evaluation/selection process, recommendations were forwarded to the Mayor and City Commission. On March 19, 2003, the Mayor and City Commission approved the selection of the Market Company and authorized the Administration to negotiate three (3) separate concession agreements.

The Administration and the Market Company have negotiated and agreement has been reached on three separate Concession Agreements for, 1) Espanola Way, 2) Lincoln Road, and 3) Normandy Village. For each market, the Market Company has agreed to pay the City a minimum guaranteed amount annually, equal to 75% of its prior calendar year (2003) gross receipts, or 15% percent of its gross receipts, whichever is greater. If 2004 revenues exceed 2003 revenues, the payments will increase as follows; 1) if revenues exceed 110% of prior year revenues, an additional 2.5% of those revenues that exceed 100% through and including 120% of prior year revenues, will be remitted; and 2) if revenues exceed 120% of prior year revenues, an additional 5% of those revenues that exceed 120% of prior year revenues will also be remitted. For each market a security deposit, equal to approximately one month's rent (based on the average of 2003 revenues) will be remitted. Each market agreement has an initial term of one year (April 1, 2004 to March 31, 2005), with an option to renew each, at the City's discretion, for an additional 1 year term.

The Administration recommends that the Mayor and City Commission adopt the Resolutions.

Advisory Board Recommendation:

Finance and Citywide Projects Committee (December 22, 2003)

Financial Information:

Source of Funds:		Amount	Account	Approved
<div style="border: 1px solid black; width: 100px; height: 100px; display: flex; align-items: center; justify-content: center;"> </div> Finance Dept.	1			
	2			
	3			
	4			
	Total			

City Clerk's Office Legislative Tracking:

Christina Cuervo/Joe Damien

Sign-Offs:

Department Director	Assistant City Manager	City Manager

CITY OF MIAMI BEACH

CITY HALL 1700 CONVENTION CENTER DRIVE MIAMI BEACH, FLORIDA 33139
www.ci.miami-beach.fl.us



COMMISSION MEMORANDUM

To: Mayor David Dermer and
Members of the City Commission

Date: March 17, 2004

From: Jorge M. Gonzalez *JMG*
City Manager

Subject: A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND THE MARKET COMPANY, INC., FOR THE MANAGEMENT AND OPERATION OF A STREET MARKET IN THAT PORTION OF THE ESPANOLA WAY PUBLIC RIGHT-OF-WAY, BETWEEN WASHINGTON AVENUE AND DREXEL AVENUE, SAID AGREEMENT HAVING AN INITIAL TERM OF ONE (1) YEAR, COMMENCING ON APRIL 1, 2004, AND EXPIRING ON MARCH 31, 2005, WITH AN OPTION TO RENEW, AT THE CITY'S SOLE DISCRETION, FOR AN ADDITIONAL ONE YEAR TERM, SUBJECT TO THE TERMS PROVIDED IN THE AGREEMENT

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND THE MARKET COMPANY, INC., FOR THE MANAGEMENT AND OPERATION OF A GREEN MARKET IN THAT PORTION OF THE LINCOLN ROAD PUBLIC RIGHT-OF-WAY, BETWEEN DREXEL AVENUE AND LENOX AVENUE, SAID AGREEMENT HAVING AN INITIAL TERM OF ONE (1) YEAR, COMMENCING ON APRIL 1, 2004, AND EXPIRING ON MARCH 31, 2005, WITH AN OPTION TO RENEW, AT THE CITY'S SOLE DISCRETION, FOR AN ADDITIONAL ONE YEAR TERM, SUBJECT TO THE TERMS PROVIDED IN THE AGREEMENT

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND THE MARKET COMPANY, INC., FOR THE MANAGEMENT AND OPERATION OF A STREET MARKET IN THAT PORTION OF THE RUE VENDOME PUBLIC RIGHT-OF-WAY, BETWEEN 71ST STREET AND NORMANDY DRIVE, SAID AGREEMENT HAVING AN INITIAL TERM OF ONE (1) YEAR, COMMENCING ON APRIL 1, 2004, AND EXPIRING ON MARCH 31, 2005, WITH AN OPTION TO RENEW, AT THE CITY'S SOLE DISCRETION, FOR AN ADDITIONAL ONE YEAR TERM, SUBJECT TO THE TERMS PROVIDED IN THE AGREEMENT

ADMINISTRATION RECOMMENDATION

Adopt the Resolutions,

ANALYSIS

On July 31, 2002, the Mayor and City Commission adopted Resolution No. 2002-24947, approving the issuance of Request for Proposals (RFP) 57-01/02 for the operation and management of a green market on a portion of the Lincoln Road right-of-way, a street-market on a portion of the

Espanola Way right-of-way, and a street-market on Normandy Island on Rue Vendome. Said RFP was issued, and proposals were received from several interested parties. After an evaluation and selection process, recommendations were forwarded to the Mayor and City Commission. On March 19, 2003, via Resolution 2003-25154, the Mayor and City Commission approved the selection of the Market Company, Inc. (Market Company) and authorized the Administration to negotiate three (3) separate concession agreements:

- 1) Lincoln Road Green Market (includes fruits, vegetables, juices, nuts and other related products; plants and cut flowers)
- 2) Espanola Way Street Market (include arts and crafts; cut flowers and plants; fruits, juices, nuts, and other related products)
- 3) Normandy Village Street Market (include arts and crafts; fruits, vegetables, cut flowers, orchids and other related green market products; tropical fruit preserves, dressings, dried fruits and nuts, honey and organic produce)

The Administration has since met on several occasions with the Market Company, as well as with certain merchant organizations, neighborhood associations, and local property owners regarding the aforementioned agreements. The Administration, recommended that the matter be referred to the Finance and Citywide Projects Committee (Committee), in order to seek the Committee's direction, from a policy perspective, on the following issues that remained outstanding and unresolved.

Originally Proposed Fees for Vendor/Merchant Spaces

- Market Company proposed a reduced rate for adjoining storefront merchants
- The City Administration proposed that booth fees be consistent regardless of vendor status (whether adjoining storefront merchant or not)

Originally Proposed Security/Off-duty Police

- Market Company proposed that off-duty police presence only be required during the initial four hours (including set-up) and final four hours (including load-out) of operation.
- The City Administration proposed that those markets which require street closure (Espanola Way and Normandy Isle) have off-duty police presence daily, during all hours of operation (including set-up and load-out times), which is consistent with the City's policy for street closures.

Originally Proposed Financial Remuneration to the City

- RFP required a minimum of 10% of gross receipts by the market producer(s) for each of the three (3) market agreements.
- Market Company originally proposed the following annual monetary return to the City:

Lincoln Road:

15% of gross revenues to City (approximately \$13,500 based on Market Company's 2003 estimate of \$90,000 in gross revenues); plus \$12,000 to Lincoln Road Marketing Inc., which represents 13% of projected gross revenues, (approximately \$6,000 to Lincoln Road Marketing, Inc. and \$6,000 for Lincoln Road street market publicity).

Espanola Way:

15% of gross revenues to City (approximately \$18,000 based on Market Company's 2003 estimate of \$120,000 in gross revenues); plus \$18,000 to the Espanola Way Association, which represents 15% of projected gross revenues (approximately \$9,000 in cash and \$9,000 in in-kind services to the Espanola Way Association).

Normandy Village:

15% of gross revenues to the City; plus approximately \$6,000 in in-kind services to the North Beach Development Corporation, for market entertainment and special event production.

As part of the negotiations, the Administration requested the Market Company remit, directly to the City, the additional remunerations referenced above, that would inure to the benefit of the area associations so that the City Commission could determine the proper allocation methodology and intended use and beneficiaries. However, during said negotiations, the Market Company indicated that said additional amounts are no longer being paid and that circumstances have changed, affecting the market revenues and price proposals submitted with respect to the additional remuneration, thereby offering only the 15% return to the City.

On December 22, 2003, the Finance and Citywide Projects Committee recommended that the Administration and the Market Company revisit these issues, reach mutual agreement regarding same, and bring closure to the three (3) concession agreements. Commissioner Bower agreed to facilitate the mediation of the outstanding issues.

As a result of a January 3, 2004, on-site meeting at Espanola Way, which was attended by Commissioner Bower, Market Company representatives and City Administrative staff, and several subsequent meetings to bring closure to any outstanding issues, the parties agreed to the following terms and conditions:

1. Security during Set-up and Move-Out:

- a. In a compromise regarding the Market Company's request to not provide an "Off-duty" Police Officer during market "set-up" and "move-out" periods, a mutual agreement has been reached that a City Field Monitor would assume responsibility for a portion of the required hours and the Market Company would reimburse the City for the costs of said Field Monitor position, for a minimum of four (4) hours daily during "set-up" times on Saturday and Sundays. Said Field Monitor would be responsible for monitoring all three markets as follows:

<u>Saturday (4 hours)</u>	<u>Sunday (4 hours)</u>
Espanola Way (2 hours)	Espanola Way Market (2 hours)
Normandy Market (2 hours)	Lincoln Road Market (2 hours)

- b. The Market Company has further agreed that an "Off-duty" Police Officer, as required, shall be hired by them, for a minimum of four (4) hours daily during "move-out" periods on Friday, Saturday and Sunday, for the Espanola Way Market only.

2. Financial Remunerations to the City:

a. Minimum Annual Guarantee:

- i. The Market Company has agreed to pay the City a minimum guaranteed amount annually, equal to 75% of its prior calendar year (2003) gross receipts, based on the amount of monies paid to the City, via its Special Event Permit during said calendar year period.

b. Percentage of Gross:

- i. In exchange for the City not regulating the fees the Market Company shall charge vendors/merchants for booth space, the Market Company agrees to remit, on monthly basis, fifteen (15%) percent of its gross receipts. In the event that the Market Company's calendar year 2004 revenues exceed the previous calendar year (2003) revenues, the Market Company agrees to increase its payments to the City in accordance to the following scale:

1. if revenues exceed 110% of prior year revenues, the Market Company shall remit to the City an additional 2.5%¹ of those revenues that exceed 100% through and including 120% of the prior year revenues; and
2. if revenues exceed 120% of prior year revenues, the Market Company shall remit to the City an additional 5%² of those revenues that exceed 120% of the prior year revenues to the City

c. Based on the foregoing, and more specific to each market, minimum annual financial remuneration to the City will be:

- i. Lincoln Road: The greater of 15% of its gross revenues, or a minimum guaranteed amount of \$8,400 (based on approximately 75% of Market Company's calendar year 2003 actual revenues remitted to City of \$11,137, via their respective Special Event Permits)
- ii. Espanola Way: The greater of 15% of its gross revenues, or a minimum guaranteed amount of \$12,300 (based on approximately 75% of Market Company's calendar year 2003 actual revenues remitted to City of \$16,367, via their respective 2003 Special Event Permits)
- iii. Normandy Village: The greater of 15% of its gross revenues, or a minimum guaranteed amount of \$3,500 (based on approximately 75% of Market Company's calendar year 2003 actual revenues remitted to City of \$4,595, via their respective 2003 Special Event Permits)

d. Security Deposit:

- i. The Market Company has agreed to pay a security deposit, in an amount equal to approximately one month's rent, based on the average of revenues remitted to the City, via its Special Events Permit for calendar year 2003.
1. Lincoln Road: \$1,000 (based on approximately 1/12th of actual revenue remitted to the City by the Market Company of \$11,137, via its respective Special Event Permits for calendar year 2003)
 2. Espanola Way: \$1,400 (based on approximately 1/12th of actual revenue remitted to the City by the Market Company of \$16,367, via its respective Special Event Permits for calendar year 2003)
 3. Normandy Village: \$400 (based on approximately 1/12th of actual revenue remitted to the City by the Market Company of \$4,595, via its respective Special Event Permits for calendar year 2003)

1 Effectively equates to 17.5% of gross revenues between 100% and 120% of prior year revenue

2 Effectively equates to 20% of gross revenues that exceed 120% of prior year revenue

The Administration recommends that the Mayor and City Commission approve three (3) separate Concession Agreements by and between the City of Miami Beach and the Market Company, Inc., for the management and operation of: 1) for the Lincoln Road Green Market, 2) for the Espanola Way Street Market, and 3) for the Normandy Village Street Market, said agreements each having an initial term of one (1) year, commencing on April 1, 2004, and expiring on March 31, 2005, with options to renew each, at the City's sole discretion, for an additional one year term.

^{all}
JMG\CMC\JD\lr

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RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND THE MARKET COMPANY, INC., FOR THE MANAGEMENT AND OPERATION OF A STREET MARKET IN THAT PORTION OF THE ESPANOLA WAY PUBLIC RIGHT-OF-WAY, BETWEEN WASHINGTON AVENUE AND DREXEL AVENUE; SAID AGREEMENT HAVING AN INITIAL TERM OF ONE (1) YEAR, COMMENCING ON APRIL 1, 2004, AND EXPIRING ON MARCH 31, 2005, WITH AN OPTION TO RENEW, AT THE CITY'S SOLE DISCRETION, FOR AN ADDITIONAL ONE YEAR TERM, SUBJECT TO THE TERMS PROVIDED IN THE AGREEMENT

WHEREAS, on July 31, 2002, the Mayor and City Commission adopted Resolution No. 2002-24947, approving the issuance of Request for Proposals No. 57-01/02, for the operation and management of a green market on a portion of the Lincoln Road right of way, a street market on a portion of the Espanola Way right-of-way, and a street-market on Normandy Island on Rue Vendome (the RFP); and

WHEREAS, said RFP was issued, proposals were received from interested parties, and after an evaluation and selection process, recommendations were forwarded to the Mayor and City Commission; and

WHEREAS, on March 19, 2003, via Resolution 2003-25154, the Mayor and City Commission approved the selection of The Market Company, Inc. (Market Company) and authorized the City Administration to negotiate three (3) separate concession agreements for a: 1) Lincoln Road Green Market; 2) Espanola Way Street Market; and 3) Normandy Village Street Market; and

WHEREAS, the Administration has negotiated with The Market Company and agreement has been attained with regard to the Espanola Way Market Concession Agreement, as attached hereto; and

WHEREAS, said Agreement has an initial term of one (1) year, commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one (1) year term; and

WHEREAS, said Concession Agreement is also terminable for convenience by either party and without cause, upon thirty (30) days written notice to the other party.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission approve and authorize the Mayor and City Clerk to execute the attached

Concession Agreement by and between the City Of Miami Beach and the Market Company, Inc., for the Management and Operation of a Street market in that Portion of the Espanola Way Public Right-of-Way, between Washington Avenue and Drexel Avenue; said Agreement having an initial term of one (1) year, commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one year term, subject to the terms provided in the Agreement.

PASSED AND ADOPTED THIS 17th day of March 2004.

CITY CLERK

MAYOR

JMG:CMC:JD:rlr

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**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**


City Attorney

3/12/04
Date

The Market Company, Inc.

Management and Operation Agreement for the Espanola Way Street Market

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**CONCESSION AGREEMENT BETWEEN
CITY OF MIAMI BEACH, FLORIDA AND
THE MARKET COMPANY, INC.
FOR MANAGEMENT AND OPERATION OF THE
ESPANOLA WAY STREET MARKET
PURSUANT TO REQUEST FOR PROPOSALS NO. 67-01/02**

THIS AGREEMENT made the _____ day of _____, 2004, between the **CITY OF MIAMI BEACH**, a municipal corporation of the State of Florida (hereinafter called "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **THE MARKET COMPANY, INC.**, a corporation established pursuant to the laws of the State of Florida, with offices at 428 Espanola Way, Miami Beach, Florida 33139 (hereinafter called "Concessionaire").

WITNESSETH

WHEREAS, on July 31, 2002, the Mayor and City Commission adopted Resolution No. 2002-24947, authorizing the Administration to issue a Request for Proposals (RFP) for the management and operation of street markets at various locations within the City; and

WHEREAS, on August 20, 2003, said RFP was issued, responses were received and evaluated, and recommendations were forwarded to the Mayor and City Commission; and

WHEREAS, on March 19, 2003, the Mayor and City Commission adopted Resolution No. 2003-25154, authorizing the Administration to enter into negotiations, via three (3) separate concession agreements, with The Market Company, Inc. (Concessionaire) for the operation and management of street markets on 1) Lincoln Road, 2) Espanola Way and 3) Normandy Village; and

WHEREAS, the Administration has successfully negotiated the foregoing Concession Agreement with The Market Company, Inc., for the operation and management of the Espanola Way Street Market, on a portion of the public right-of-way known as Espanola Way (between Washington Avenue and Drexel Avenue), and on a portion of the public right-of-way known as Drexel Avenue (from Espanola Way southward through and including the cul-de-sac) (collectively the "Concession Area"); said Agreement commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one (1) year term.

NOW THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained and other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, it is agreed by the parties hereto as follows:

The City hereby grants to the Concessionaire, and the Concessionaire hereby accepts from the City, the exclusive right to operate the following described concession within the Concession Area, as defined herein, in conformance with the purposes and for the period stated herein, and subject to all the terms and conditions herein contained and fairly implied by the terms hereinafter set forth.

SECTION 1. TERM.

- 1.1 This Agreement shall be for an initial term of one (1) year, commencing on **April 1, 2004** (the "Commencement Date"), and ending on **March 31, 2005**.
- 1.2 Provided that the Concessionaire is not in default under **Section 13** hereof, and at the City's sole discretion, commencing upon written notice from Concessionaire to the City, which notice shall be given no later than 90 days prior to the expiration of the initial term of the Agreement. The City may extend the term of this Agreement for an additional one (1) year period, commencing on **April 1, 2004**, and ending on **March 31, 2005**.

SECTION 2. CONCESSION AREA.

The City hereby grants to the Concessionaire the exclusive right, during the term of this Agreement, to operate a concession for an open air street market, as described herein, in the following area(s) (hereinafter referred to collectively as the "Concession Area"), as more specifically delineated in Exhibit 2.0 herein:

- 2.1 Area 1. Espanola Way.
This Concession Area is limited to the public right-of-way bounded on the south by a line which lies no less than 5'0" north of, and parallel to the property line of the privately owned property abutting the southernmost edge of the sidewalk adjacent to the south edge of Espanola Way (keeping, at minimum, a clear unobstructed 5'0" clear path of travel for pedestrians between the private property and the Concession Area); bounded on the north by a line which lies no less than 5'0" south of, and parallel to the property line of the privately owned property abutting the northernmost edge of the sidewalk adjacent to the north edge of Espanola Way (keeping, at minimum, a clear unobstructed 5'0" clear path of travel for pedestrians between the private property and the Concession Area); bounded on the west by the easternmost line of Drexel Avenue; and bounded on the east by the westernmost edge of the sidewalk/crosswalk adjacent to Washington Avenue. The Concession Area does not include those portions of the public right-of-way where fountains, seating, or other public amenities or other uses authorized/licensed/permitted by the City are currently located or may be located in the future.
- 2.2 Area 2. Drexel Avenue.
This Concession Area is limited to the public right-of-way bounded on the south by the northernmost edge of the sidewalk adjacent to the Drexel Avenue cul-de-sac; bounded on the north by the southernmost edge of the sidewalk/crosswalk adjacent to Espanola Way; bounded on the west by the easternmost edge of the sidewalk adjacent to Drexel Avenue; and bounded on the east by the westernmost edge of the sidewalk adjacent to Drexel Avenue. The Concession Area does not include those portions of the public right-of-way where fountains, seating, or other public amenities or other uses authorized/licensed/permitted by the City are currently located or may be located in the future.
- 2.3 Notwithstanding the use of the Concession Area granted to Concessionaire above, Concessionaire herein understands, agrees, and acknowledges that

the Concession Area, along with any and all other public right-of-way area(s) not specifically identified herein, are public and, as such, must remain available for the use and enjoyment of the general public whether or not the public chooses to purchase any of Concessionaire's goods, or otherwise partake of any of the services it provides. In the event that a member of the public is within a particular area of the Concession Area, Concessionaire agrees to allow for his/her continued peaceful enjoyment of said area.

SECTION 3. USE(S).

The Concessionaire is hereby authorized to conduct the following kind(s) of business(es) within the Concession Area, as provided below, all at its sole cost and expense:

3.1 Concessionaire shall operate and manage an open air street market, commonly known and referred to herein as the "Española Way Street Market" (the Market), which shall provide a venue for vendors to sell and/or provide the following (as each is more specifically defined in Section 3.2):

- a) Arts and Crafts Merchandise;
- b) Plants and Cut Flowers;
- c) Fruits, vegetables, and other edible products and related food items; and
- d) Live Entertainment

This shall also generally include the rental of booths, tents, tables, signs or space(s) (collectively the "facilities"), in conformance with the attached site plan (Exhibit 2.0). The City herein approves the rental of the aforesated facilities, and the prices for same, all as set forth in Exhibit 3.1, and as provided in Section 18. Any amendments to Exhibit 3.1 must be approved in writing by the City Manager or his designee and, prior to implementation of same, a new Exhibit 3.1 shall be incorporated herein.

3.1.1 Facilities Design:

The design, type, material, and color of any and all facilities, as defined above, shall be approved in writing by the City's Planning Department prior to the Commencement Date of this Agreement. A photo or photo(s) of City-approved facilities is incorporated herein as Exhibit 3.1.1. Thereafter, Concessionaire shall not change, alter, or modify said City-approved design, type, material and color of any facilities without the prior written consent of the City Manager or his designee, and, if so approved, an updated Exhibit 3.1.1 will be made a part of and incorporated into this Agreement.

3.1.2 Placement of Facilities:

All respective facilities within the Concession Area shall be placed substantially in accordance with the attached site plans for Area 1 and Area 2 respectively, herein approved by the City and attached hereto and incorporated as Exhibit 2.0 herein. Concessionaire shall not deviate from or alter the approved site plans without the prior written consent of the City Manager or his designee.

3.1.2.1 Compliance with American with Disabilities Act (ADA) and any other applicable accessibility standards:

Concessionaire agrees and acknowledges that during all periods when its Market is in operation, including set-up and break-down periods, it shall comply with ADA standards, Florida Accessibility Code standards, and any other applicable accessibility standards required by law, including the provisions of the City's "Special Events Disability Access Punch List", attached hereto and incorporated as Exhibit 3.1.2.1 herein. Concessionaire's compliance with the provisions set forth in the attached Exhibit 3.1.2.1, includes, but shall not be limited to, any and all responsibilities associated with "Event Producer" as described therein.

3.1.2.2 The Concessionaire's responsibility to comply with the aforementioned provisions in Subsection 3.1.2.1 include, but are not limited to, ensuring that there is an accessible path of travel from the handicap designated parking spaces and public transportation stops within the boundary of, areas associated with, and entrances to, Espanola Way and Drexel Avenue. Concessionaire shall:

- a) maintain accessible path(s) of travel that permit the unobstructed access to the entryways of all buildings, facilities, elements and spaces along Espanola Way and Drexel Avenue,
- b) maintain an unobstructed accessible path of travel on both the north sidewalk and the south sidewalk of Espanola Way, and
- c) maintain an unobstructed accessible path(s) of travel from the north walkway to the south walkway of Espanola Way.

3.1.2.3 Notwithstanding the above, Concessionaire's responsibility to comply with the requirements of this Section 3.1.2.1 and Section 3.1.2.2 shall be limited to those areas within the Concession Area as provided in Section 2.0 herein.

3.1.3 Set Up:

The set up of facilities to be placed within the Concession Area, substantially in accordance with the site plan(s) approved pursuant to Exhibit 2.0, shall be in accordance with the hours of operation in Section 9. Placement of vendor facilities shall be in accordance with and shall not exceed the maximum numbers, for Area 1 and Area 2 respectively, set forth in Exhibit 2.0, attached hereto and incorporated herein.

3.1.4

Public Right-of-Way:

The City and Concessionaire agree and acknowledge that the public's use of the public right-of way is a prime consideration and must be balanced accordingly with Concessionaire's proposed operations, as set forth herein. Accordingly, notwithstanding the site plans and maximum numbers (as provided for in the Set Up period) set forth in Subsection 3.1.3, Concessionaire further agrees that, notwithstanding its right to set up its maximum numbers, it will not alter or modify its site plans without the prior written consent of the City Manager or his designee.

Notwithstanding the preceding paragraph, City and Concessionaire may, from time to time, meet to review and, subject to City's prior written consent, revise the maximum numbers (as provided for in the Set-Up period) set forth in Subsection 3.1.3.

3.1.5

Interaction and Coordination with Other Espanola Way Operations and Events:

Concessionaire agrees and understands that there are other businesses, establishments, operations and events which are ongoing, or may occur from time to time within or in close proximity to, the Concession Area. As such, Concessionaire agrees that it will use its best efforts to cooperate and coordinate with said businesses, establishments, operations and events so as to minimize the impact to the respective parties.

3.1.6

Conflict Resolution:

Concessionaire recognizes and understands that conflicts with one or more of the following entities, groups, and/or individuals may arise during the term of this Agreement, or any extensions thereof:

- Conflicts between Espanola Way (or other) Merchants/Businesses and Concessionaire
- Conflicts between Vendors and Concessionaire
- Conflicts between Vendors and the General Public
- Conflicts between General Public and Concessionaire

As such, Concessionaire further recognizes and understands that notice of said conflicts may be directed to the attention of Concessionaire or the City. In the event a notice of conflict is communicated to the City, the City will communicate same to the Concessionaire, as soon as practicable.

Whenever a conflict arises, upon Concessionaire's receipt of notice of same, whether written or verbal, between any of the aforesaid entities, groups, or individuals, with any of Concessionaire's operations, resolution to said conflicts will be addressed in the following manner:

1. Concessionaire shall meet with the conflicted party and endeavor, using its best efforts and good faith, to resolve the conflict to the satisfaction of all parties concerned within fourteen (14) calendar days from receipt of notice.
2. In the event the conflict cannot be resolved as stated in Number 1 above, then the Concessionaire shall provide written notice to the conflicted party, (with copy to the City Manager's designee) with a date on which to meet with the City Manager's designee, to address the conflict. At that time, the City Manager's designee will recommend a resolution. The City Manager's designee shall endeavor to set a meeting date within fourteen (14) calendar days of receipt of a copy of the written notice to the conflicted party. For purposes of this Section, the City Manager's designee shall be the Asset Manager of the City.
3. In the event the resolution recommended by the City Manager's designee is not acceptable to the Concessionaire or the conflicted party, the City Manager's designee shall inform the City Manager, and provide him with the pertinent details of the conflict. The City Manager may make a determination as to whether he concurs with the designee's recommendation; offer an alternate resolution; or choose to meet with Concessionaire and the conflicted party to get additional information prior to making a final determination.

Notwithstanding the foregoing, the City Manager's final determination, will be binding upon Concessionaire, and Concessionaire shall agree to be bound by same.

Concessionaire agrees and understands that the above referenced conflict resolution language is not applicable to any conflicts that may arise between the City and the Concessionaire pursuant to this Agreement, or conflicts outside of the City's purview, control or jurisdiction.

- 3.1.7 The condition and quality of Concessionaire's facilities shall at all times be maintained in a manner that is consistent with the condition and quality of similar facilities in first class open air markets located in other world class areas. It is the City's intent, and Concessionaire hereby agrees and acknowledges same, to develop and promote world class open air street market facilities and operations that would be comparable to those found in other world class public areas. Accordingly, Concessionaire shall not only, at a minimum, ensure that all facilities placed within the Concession Area are well maintained and in usable condition, but shall adhere, as indicated in this Subsection, to high ongoing maintenance standards for same consistent with the aforementioned condition and quality.

3.1.8 Quality of goods and services offered will be first-rate and comparable to that available in open air markets in other world class areas on par with the City of Miami Beach or, at a minimum, to the quality and pricing of goods and services provided by privately owned businesses selling like goods and services within the City of Miami Beach.

3.1.9 In addition to Concessionaire's general maintenance obligations for the Concession Area, as set forth in Section 10 hereof, all portions of the Concession Area, and the immediately surrounding 25-foot adjacent areas, shall at all times be maintained in a clean and sanitary manner.

3.1.10 The concession operations shall be offered to patrons at all times during the days and hours of operation set forth in Section 9 herein. However, if the City, at its sole discretion, deems that there is a decrease in demand for the concession operations, or if the Concessionaire provides the City with written notice that it is desirous of reducing its hours of operation, (i) the City shall provide Concessionaire with a minimum of two (2) weeks prior written notice, requesting the specific decrease in Concessionaire's operation, or (ii) Concessionaire shall provide the City with, at minimum, two weeks prior written notice, requesting to reduce said hours, for the City's written approval (which shall not be unreasonably withheld) prior to implementing said schedule of reduced hours of operation. Said notice to the City shall include the newly proposed schedule of operation.

Similarly, if Concessionaire is desirous of increasing its hours of operation in the Concession Area then, in that event, the Concessionaire shall obtain the City's prior written consent.

Concessionaire agrees and acknowledges that any Concessionaire requested reduction in the scheduled hours of operation as may be provided herein shall not in any way reduce Concessionaire's financial responsibility to the City, as required in Section 4, except if same is deemed by the City to be a partial termination pursuant to Subsection 13.6.3.

3.2 Permitted Concession Operations / Uses.

3.2.1 Arts and Crafts:

This shall generally include the sale of those goods and items identified in Exhibit 3.2.1, substantially in accordance with the price ranges set forth therein. Any amendments to Exhibit 3.2.1, whether as to changes and/or additions of goods and items to be offered for sale, or in the respective price ranges for same, must be approved in writing by the City Manager or his designee, prior to such changes and/or additions being implemented and a new updated Exhibit 3.2.1 will be incorporated into this Agreement.

- 3.2.2 Cut Flowers and Plants:
This shall generally include the sale of flowers, either individually or in bunches that have been cut from their base, and potted plants.
- 3.2.3 Fruits, Vegetables, Other Edible Products:
This shall generally include the sale of those edible items defined as, and generally including, fresh fruits, dried fruits, vegetables, nuts, preserves, pickled items, jams, jellies, juices, smoothies, and other non-alcoholic beverages.
- 3.2.4 Live Entertainment:
- 3.2.4.1 Any live entertainment that is provided by Concessionaire shall be limited to: solo, duo and/or trio performers, unless otherwise approved, in writing, by the City Manager or his designee.
- 3.2.4.2 For purposes of this Agreement, the term "performers" shall include individuals who provide live entertainment by means of musical instruments, singing, dancing, theatrical and dramatic interpretation, mimes, etc. Notwithstanding, the foregoing, Concessionaire must comply with City and Miami-Dade County Noise Ordinance(s), and any other applicable regulation, at all times.
- 3.2.5 In the event that the City Manager or his designee determines, at his sole option and discretion, that all or a portion of Concessionaire's proposed uses, pursuant to Subsection 3.1 and as defined in Section 3.2, are no longer desired, then the City may revoke Concessionaire's right to provide all or a portion of said uses, without cause, upon thirty (30) days written notice to Concessionaire. Any percentage of gross paid by Concessionaire (pursuant to Subsections 4.2 and 4.3) to City with regard to a delete/discontinued use, shall be prorated and/or adjusted accordingly as of the date of termination of said use, and no further payment shall be required for same during the term of this Agreement, unless the City reinstates the use, at which time the payment provisions of Subsections 4.2 and 4.3 shall once again apply.
- 3.3 Intentionally Omitted.
- 3.4 Intentionally Omitted.
- 3.5 Intentionally Omitted.
- 3.6 Off-Duty Police / Field Monitor.
- 3.6.1 Off-Duty Police:
Concessionaire agrees that an Off-Duty Police Officer is required and shall be present daily on Friday, Saturday and Sunday evenings during closing/move-out times. Concessionaire shall be responsible

for coordinating, scheduling, and hiring said Off-Duty Police Officer, as well as, for all costs and expenses related thereto. In the event either party requests any changes to this Section 3.6.1, as same may be warranted by changes in Market conditions or operations, the parties herein agree to meet and discuss said proposed changes.

3.6.2 Field Monitor:

Additionally, Concessionaire agrees and understands that a Field Monitor, who will report to and be under the direction of the City, is required for a minimum of two (2) hours daily on Saturday and Sunday mornings in order to assist and facilitate during set-up times. Concessionaire further agrees and understands that any and all costs associated with said Field Monitor shall be borne by Concessionaire and reimbursed to the City on a monthly basis, along with its regularly scheduled monthly payments pursuant to Section 4.2 herein. Concessionaire's responsibility for the costs associated with said Field Monitor position for the initial term shall be limited to Seventeen (\$17.00) Dollars per hour. During the renewal term, said limit shall be increased by 3% per contract year or by the annual Consumer Price Index, All Urban Consumers, as reported by the U.S. Bureau of Labor Statistics (CPI), whichever is greater.

3.6.3 Concessionaire supervisory/management employee shall be on duty and on-site within the Concession Area, or available via telephone, at all times during which the Market is operating, including but not limited to Set-Up and Move-Out periods, as defined in Subsection 9.2 herein.

3.7 Vendor Selection / First Priority to Miami Beach Merchants.

3.7.1 Within thirty (30) days from the Commencement Date of this Concession Agreement, and for a period of thirty (30) days thereafter, the Concessionaire shall offer Miami Beach licensed merchants the opportunity to participate (a booth space in the Market) as vendors before opening its search to the general public or other networks. The Concessionaire will establish this "pool" and will also serve as the clearinghouse for booth availability and vendor applicants. The Concessionaire shall commit to use this clearinghouse during the initial availability of booth space before expanding its search to other networks.

The Concessionaire will use best efforts to ensure that all Miami Beach licensed merchants are contacted and that announcements regarding booth availability are disseminated throughout the City of Miami Beach, as quickly as possible so as to take optimum advantage of the thirty (30) day availability period, including but not limited to, advertising in a local newspaper, placing information on the Market or other websites, or other similar efforts.

The Concessionaire will make itself available to answer any questions potential applicants may have about the Market.

- 3.7.2 Notwithstanding the foregoing, and for purposes of this Section 3.7, in the event that the number of responsive Miami Beach licensed merchants desirous of participating in the Market would cause Concessionaire to displace any vendors who have been and are currently and actively participating in the Market as of the date of execution of this Agreement, and such displacement is directly due to lack of available space within the Concession Area, then in such event Concessionaire and the City agree to meet and discuss, in good faith, and make reasonable efforts to resolve this matter. It is understood by the parties herein, that the intent of this Subsection 3.7 is not to displace vendors who are currently and actively participating in the Market but to provide opportunities for those Miami Beach licensed merchants who desire to participate in the Market.
- 3.7.3 The Concessionaire will keep and make available to the City for inspection, upon notice by the City, carefully detailed records, including the name, address, telephone numbers, qualifications, experience, and the proposed goods and services to be offered for sale by its vendors, and will pay particular attention to matching vendors and booths with appropriate locations.
- 3.8 Removal of Concession Facilities.
Concessionaire agrees that all its facilities or other items used in the concession operations will be removed from the public right-of-way/Concession Area and said removal shall be done on a daily basis, in compliance with the time parameter(s) set forth in Subsection 9.2 herein.
- 3.9 Hurricane Evacuation Plan.
Concessionaire agrees that all its facilities or other items used in the concession operations will be removed from the public right-of-way/Concession Area and said removal shall immediately begin no later than upon the issuance of a Hurricane Warning by the Miami-Dade County Office of Emergency Management, and stored at a private, off-site location.
- 3.10 City Occupational Licenses.
Concessionaire shall obtain, at its sole cost and expense, any occupational licenses required by City law, as amended from time to time, for its proposed operations, as contemplated in Section 3 of this Agreement. For purposes of this Agreement, Concessionaire shall obtain the applicable "Promoters" category City occupational license.

SECTION 4. CONCESSION FEES.

- 4.1 Security Deposit.
Upon execution of this Agreement Concessionaire shall furnish the City with a Security Deposit, in the amount of One Thousand Four Hundred (\$1,400) Dollars (approximately equal to one month's rent based on the Market's prior year's actual revenues). Said Security Deposit shall serve to secure Concessionaire's performance in accordance with the provisions of this Agreement. In the event the Concessionaire fails to perform in accordance with said provisions, the City may retain said Security Deposit, as well as

pursue any and all other legal remedies provided herein, or as may be provided by applicable law.

The parties agree and acknowledge that the foregoing condition is intended to be a condition subsequent to the City's approval of this Agreement. Accordingly, in the event that Concessionaire does not satisfy the aforestated condition within the time periods provided herein, then the City Manager or his designee may immediately, without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to him for breach of contract.

4.2 Percentage of Gross (vs.) MG (PG).

During the initial term, and any renewal term, of the Agreement, Concessionaire shall pay the City, on a monthly basis, and within thirty (30) calendar days from the end of each month during the term herein, an amount equal to fifteen (15%) percent of Concessionaire's gross receipts (PG). In the event that the annual PG is less than the amount provided in Subsection 4.3 below, then the Concessionaire shall also pay to the City, on an annual basis, the difference between the PG amount and the amount provided in Subsection 4.3 below, no later than 30 days after the expiration of the initial term, or of the renewal term of this Agreement, as the case may be.

Notwithstanding the above, in the event Concessionaire's annual gross receipts exceed 110% of its prior year gross receipts, Concessionaire shall pay to the City an additional amount equal to 2.5% of those gross receipts that exceed 100%, through and including those gross receipts that equal 120% of its prior year's gross receipts; and

In the event Concessionaire's annual gross receipts exceed 120% of its prior year gross receipts, Concessionaire shall also pay to the City an additional amount equal to 5% of those gross receipts that exceed 120% of its prior year's gross receipts.

The term "gross receipts" is understood to mean all income, whether collected or accrued, derived by the Concessionaire under the privileges granted by this Agreement, excluding amounts of any Federal, State, or City sales tax, or other tax, governmental imposition, assessment, charge or expense of any kind, collected by the Concessionaire from customers and required by law to be remitted to the taxing or other governmental authority. Except as otherwise provided, with regard to a special event under Subsection 16.1 hereof in which Concessionaire is not permitted to continue operating, the pro-rata share due to the City for the event days will be abated.

4.3 Minimum Guarantee (MG).

Notwithstanding the PG payment required pursuant to Subsection 4.2, and in consideration of the City executing this Agreement and granting the rights provided in this Agreement, Concessionaire shall pay to the City a Minimum Guaranteed Annual Concession Fee (MG) of Twelve Thousand Three Hundred Dollars (\$12,300) for the initial term. Said initial MG is based on a percentage (approximately 75%) of the Calendar Year 2003 revenues

received by the City of Miami Beach, from The Market Company, Inc., pursuant to the Market Company's Special Event permit for the Espanola Way Market for the respective time period, and shall be paid annually in accordance with Sections 4.2 and 4.3, as applicable.

In the event that the City, at its sole discretion, chooses to extend the term of this Agreement for the additional one (1) year renewal term, the renewal term year MG shall be automatically increased, by five percent (5%) from the previous year's MG, or seventy five (75%) percent of the prior year revenues remitted to the City, whichever is greater, and shall be due and payable to the City, in accordance with Sections 4.2 and 4.3, as applicable.

4.4 Cost for Use of Electricity.

Concessionaire shall also remit to the City, along with its monthly payments required under Section 4.2, an amount equal to two dollars (\$2.00) per Market day, plus applicable sales and use tax, for each vendor location that proposes to use electricity.

4.5 Interest for Late Payment.

Any payment which Concessionaire is required to make to City which is not paid on or before the respective date provided for in this Agreement shall be subject to interest at the rate of twelve percent (12%) per annum, from the due date of payment until such time as payment is actually received by the City.

4.6 Sales and Use Tax.

It is also understood that, if applicable, the required Florida State Sales and Use Tax shall be added to Concessionaire's payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax.

SECTION 5. MAINTENANCE AND EXAMINATION OF RECORDS.

Concessionaire shall maintain current, accurate, and complete financial records on an accrual basis of accounting related to its operations pursuant to this Agreement. Systems and procedures used to maintain these records shall include a system of internal controls and all accounting records shall be maintained in accordance with generally accepted accounting principles and shall be open to inspection and audit, but not photocopying, by the City Manager or his designee upon reasonable prior request and during normal business hours. Such records and accounts shall include a breakdown of gross receipts, expenses, and profit and loss statements and such records shall be maintained as would be required by an independent CPA in order to audit a statement of annual gross receipts and profit and loss statement pursuant to generally accepted accounting principles.

A monthly report of gross receipts must be submitted to the City, through the Finance Department's Revenue Manager, to be received no later than thirty (30) days after the close of each month.

SECTION 6. INSPECTION AND AUDIT.

Concessionaire shall maintain its financial records pertaining to its operations for a period of three (3) years after the conclusion of the initial term, or (if approved) the renewal term,

and such records shall be open and available to the City Manager or his designee, as deemed necessary by the City Manager or his designee. Concessionaire shall maintain all such records at its principal office, currently located at 428 Espanola Way, Miami Beach, Florida, 33139 or, if moved to another location, all such records shall be relocated, at Concessionaire's expense, to a location within the City of Miami Beach, within ten (10) days' written notice from the City that the City desires to review said records.

The City Manager or his designee shall be entitled to audit Concessionaire's records pertaining to its operation as often as it deems reasonably necessary throughout the term of this Agreement, and three (3) times within the three (3) year period following termination of the Agreement, regardless of whether such termination results from the natural expiration of the term or for any other reason. The City shall be responsible for paying all costs associated with such audits, unless the audit(s) reveals a deficiency of five percent (5%) or more in Concessionaire's statement of gross receipts for any year or years audited, in which case the firm shall pay to the City, within thirty (30) days of the audit being deemed final (as specified below), the cost of the audit and a sum equal to the amount of the deficiency revealed by the audit, plus interest; provided, however, the audit shall not be deemed final until Concessionaire has received the audit and has had a reasonable opportunity to review the audit and discuss the audit with the City. Nothing contained within this Section shall preclude the City's audit rights for resort tax collection purposes.

Concessionaire shall submit at the end of the initial term (and, if approved, the renewal term), an audited annual statement of gross receipts, in a form consistent with generally accepted accounting principles.

It is Concessionaire's intent to stay informed of comments and suggestions by the City regarding Concessionaire's performance under the Agreement. Within thirty (30) days after the end of the initial term (and, if approved, the renewal term), Concessionaire and City may meet to review Concessionaire's performance under the Agreement. At the meeting, Concessionaire and City may discuss quality, operational, maintenance and any other issues regarding Concessionaire's performance under the Agreement.

SECTION 7. TAXES, ASSESSMENTS, AND UTILITIES.

7.1 Concessionaire agrees to and shall pay before delinquency all taxes (including but not limited to resort taxes) and assessments of any kind assessed or levied upon Concessionaire by reason of this Agreement or by reason of the business or other activities and operations of Concessionaire upon or in connection with the Concession Area. Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings diligently conducted in good faith. Concessionaire may refrain from paying a tax or assessment to the extent it is contesting the assessment or imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax and/or assessment if so ordered.

Concessionaire shall also pay for any fees imposed by law for licenses or permits for any business, activities, or operations of Concessionaire upon the Concession Area.

Concessionaire shall pay before delinquency any and all charges for utilities used by, for, or on behalf of the operations contemplated herein (including, but not limited to, water, electricity, gas, heating, cooling, sewer, telephone, trash collection, etc.).

7.1.1 Electricity:

City acknowledges that Concessionaire may require electrical outlets to operate some vendor locations for registers, lighting fixtures, etc. Any usage of electricity from City-owned sources, shall be reimbursed to the City in accordance with the provisions outlined in Section 4.4 herein. Concessionaire agrees to remit to the City, on a monthly basis, along with the payment of rent, a list of all vendors which use electricity.

7.2 Procedure If Ad Valorem Taxes Assessed.

Notwithstanding Subsection 7.1 above, the parties agree that the concession operations contemplated herein are for public purposes and, therefore, no ad valorem taxes should be assessed by the Miami-Dade County Tax Appraiser. If, however, said taxes are assessed, City and Concessionaire shall use reasonable efforts to address payment of same.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

8.1 In connection with the performance of its responsibilities hereunder, Concessionaire may hire its own employees and/or independent contractors, who will be employees and/or independent contractors of Concessionaire and not employees or agents of the City. Additionally, Concessionaire's vendors shall not be considered agents or employees of the City. Concessionaire shall select the number, function, qualifications, compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to its employees and/or independent contractors.

8.2 Concessionaire shall ensure that all its employees and/or independent contractors observe all the graces of personal grooming. The Concessionaire shall hire people to work in its concession operation who are neat, clean, well groomed and shall comport themselves in a professional and courteous manner, and ensure that its vendors and/or independent contractors comply with same. The Concessionaire and any persons hired by same, shall never have been convicted of a felony. If Concessionaire materially fails to comply with this provision the City may default Concessionaire pursuant to Section 13 herein.

8.3 The Concessionaire shall have an experienced manager or managers overseeing the concession operations at all times.

SECTION 9. SCHEDULE OF OPERATION.

Concessionaire's operations shall be open on the Concession Area, in accordance with the schedule outlined below, weather or events of force majeure permitting.

9.1 Day(s) of Operation: Fridays, Saturdays and Sundays only

Operating Hours:

<u>Friday:</u>	Set-Up:	5:00 PM to 7:00 PM
	Market Hours:	7:00 PM to 12:00 AM
	Move-Out:	12:00 AM to 1:00 AM
<u>Saturday:</u>	Set-Up:	8:00 AM to 10:00 AM
	Market Hours:	10:00 AM to 12:00 AM
	Move-Out:	12:00 AM to 1:00 AM
<u>Sunday:</u>	Set-Up:	9:00 AM to 11:00 AM
	Market Hours:	11:00 AM to 9:00 PM
	Move-Out:	9:00 PM to 10:00 PM

Any change in the days or hours of operation require the prior written consent of the City Manager including, but not limited to, change in the days and hours of operation requested pursuant to Subsection 3.1.10.

SECTION 10. MAINTENANCE.

- 10.1 The Concessionaire accepts the use of the Concession Area provided in this Agreement in its "as is" condition. Concessionaire assumes sole responsibility and expense for maintenance of the Concession Area and its facilities therein. This shall include daily removal of litter, garbage and debris, said removal to be the sole responsibility and expense of Concessionaire. Daily maintenance shall be accomplished on all days and hours Concessionaire operates. Concessionaire agrees, also at its sole cost and expense, to pay for all garbage disposal generated by its operations.

- 10.2 Garbage Receptacles.
With respect to litter, garbage and debris removal, the Concessionaire shall provide, at its sole cost and expense, receptacles within the confines of the Concession Area and shall provide a sufficient number of these receptacles for its own use and for the use of the public that patronizes the Market. Disposal of the contents of said receptacles and removal of litter, garbage and debris within the Concession Area, shall be accomplished by the end of the day on all days on which the Concessionaire operates, and shall be the sole responsibility of the Concessionaire. Any costs for removal of the contents of said trash receptacles by the City, because of the Concessionaire's failure to do the same, will be charged to, and become the responsibility of, the Concessionaire. The dumping or disposal of any refuse, discards, trash or garbage, generated by, or as a result of the concession operations, into any City trash receptacles by the Concessionaire (including its staff, employees and/or vendors) shall be strictly prohibited. Determination of the "number" of receptacles shall at all times be within the City's sole discretion, and Concessionaire shall agree to be bound by same.

- 10.3 Pressure Cleaning.
Concessionaire shall be responsible, at its sole cost and expense, for the pressure cleaning of the Concession Area, including all abutting sidewalks and public right-of-way adjacent thereto, at least once every three (3)

months, or on an as needed basis, as deemed by the City, in its sole discretion.

10.4 Facilities.
Intentionally Omitted.

10.5 Orderly Operation.
The Concessionaire shall have a neat and orderly operation at all times and shall be solely responsible for the necessary housekeeping services to properly maintain the Concession Area and all facilities incident thereto. The Concessionaire shall make available all operations and facilities within the Concession Area (including but not limited to vendor facilities) for examination during days and hours of operation by the City Manager or his authorized representative.

10.6 No Dangerous Materials.

10.6.1 The Concessionaire agrees not to use or permit in the Concession Area and/or facilities the storage and/or use of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane, natural gas, or other similar substances, combustible materials, or explosives of any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida. Any such substances or materials found within the Concession Area and/or facilities shall be immediately removed.

10.6.2 Notwithstanding any contrary provisions of this Agreement, Concessionaire, after the Commencement Date, shall indemnify and hold City harmless from any loss, damage, cost, or expense of the City, including, without limitation, reasonable attorney's fees, incurred as a result of, arising from, or connected with the placement by Concessionaire, and/or its employees, vendors, agents and/or subcontractors, after the Commencement Date, but during the term of this Agreement, of any hazardous substance or petroleum products on, under, in or upon the Concession Area as those terms are defined by applicable Federal and State Statute, or any environmental rules and environmental regulations promulgated thereunder; provided, however, Concessionaire shall have no liability in the event of the willful misconduct or gross negligence of the City, its agents, servants or employees. The provisions of this Subsection 10.6 shall survive the termination or earlier expiration of this Agreement.

10.7 Security.
The Concessionaire shall be responsible for and provide reasonable security measures which may be required to protect the Concession Area and any of the facilities, goods and/or other equipment thereon. Under no circumstances shall the City be responsible for any stolen or damaged goods, facilities, materials and/or other equipment, nor shall City be responsible for any stolen or damaged personal property of Concessionaire's employees, vendors, patrons, guests, invitees, and/or other third parties.

10.8

Vehicles on the Public Right-of-Way.

Concessionaire's employees, vendors, patrons, guests, invitees, and/or other third parties vehicles and/or trailers shall only be allowed on the street adjacent to Concession Area/public right-of-way for purposes of setting up the concession operations, and to remove same at the close of operations each day, and any and all such vehicles for purposes thereon must be removed from the public right-of-way immediately thereafter. Concessionaire shall contractually require that anyone operating a vehicle for, or on behalf of Concessionaire and/or its employees, agents, and/or vendors, must have a current valid Florida Driver's License. Said set-up and move-out operations shall only be permitted during regular hours for same, pursuant to Subsection 9.2 herein, and shall be completed safely and expeditiously. No vehicular traffic or parking will be permitted on the public right-of-way during concession hours of operation, pursuant to Subsection 9.2 herein. Access to the public right-of-way shall only be permitted via specifically designated points authorized for such use and the nearest authorized access to a concession vendor's operation.

Vehicles operated on the public right-of-way shall not exceed 5 M.P.H. and shall only operate in the immediate vicinity of the concession, or to-and-from the nearest predetermined and assigned access point. After transporting facilities, goods, merchandise, equipment, and/or other items to the Concession Area, the vehicles shall be removed from the public right-of-way and parked in a legally authorized location. Driving on the public right-of-way shall be kept to a minimum. No vehicular traffic will be permitted on the public right-of-way, at any time or for any purpose, other than as stated herein.

Vehicle operator must inspect the vehicles perimeter and surrounding area, prior to turning the vehicles ignition switch, to assure a clear path of egress and only proceed with extreme caution.

10.9

Inspection.

The Concessionaire agrees that the Concession Area and all facilities and operations thereon, including but not limited to vendor booths, may be inspected at any time during days and hours of operation by the City Manager or his designee, or by any other Municipal, County, State officer, or agency having responsibilities for inspections of such operations. The Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference (which interference, if by the City, must be reasonable) with the concession operation by any public agency or official in enforcing their duties or any laws or ordinances. Any such interference (which interference, if by the City, must be reasonable) shall not relieve the Concessionaire from any obligation hereunder.

SECTION 11. INSURANCE.

Concessionaire shall maintain, at its sole cost and expense, the following types of insurance coverage at all times throughout the term of this Agreement.

- a. Comprehensive General Liability in the minimum amount of One Million

Dollars (\$1,000,000) per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability.

- b. Workers Compensation Insurance shall be provided as required under the Laws of the State of Florida.
- c. Automobile Insurance for any vehicles used for, or associated with concessionaire's operations shall be provided covering all owned, leased, and hired vehicles and non-ownership liability for not less than the following limits:

Bodily Injury	\$1,000,000 per person
Bodily Injury	\$1,000,000 per accident
Property Damage	\$1,000,000 per accident

Failure to procure or maintain the required insurance program shall, at the City's discretion, either (i) constitute an automatic default of the Concession Agreement under which the City may, upon written notice to Concessionaire, immediately terminate the Agreement; or (ii) the City, in its sole discretion, may obtain the insurance itself, in which case said insurance shall be charged back to the Concessionaire as provided in the following paragraph.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days prior written notice to the City, and then only subject to the prior written approval of the City Manager or his designee. Prior to the Commencement Date of this Agreement, Concessionaire shall provide City with a Certificate of Insurance for each such policy. ALL POLICIES SHALL NAME THE CITY OF MIAMI BEACH FLORIDA AS AN ADDITIONAL NAMED INSURED. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should Concessionaire fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, automatically terminate this Agreement or, in the alternative, deem to obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by Concessionaire to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Concessionaire fails to repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, or, at its option, the City may declare the Agreement in default pursuant to Section 13 herein.

SECTION 12. INDEMNITY.

- 12.1 In consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatsoever kind or nature arising out of

error, omission, or negligent act of Concessionaire, and/or its vendors, agents, servants, employees and/or subcontractors and/or subconcessionaires in the performance of services under this Agreement.

12.2 In addition, in consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its agents, servants or employees, from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire, and/or its vendors, agents, servants, employees and/or subcontractors and/or subconcessionaires, not included in the paragraph in the Subsection above and for which the City, its agents, servants or employees are alleged to be liable.

12.3 Subsections 12.1 and 12.2 shall survive the termination or expiration of this Agreement. Subsections 12.1 and 12.2 shall not apply, however, to any such liability, that arises as a result of the willful misconduct or gross negligence of the City, its agents, servants or employees.

12.4 Subrogation.
The terms of insurance policies referred to in Section 11 shall preclude subrogation claims against Concessionaire, the City and their respective officers, employees and agents.

12.5 Force Majeure.
Neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by:

- a. fire which renders at least thirty percent (30%) of the Concessionaire's cumulative facilities and operations unusable and which is not caused by negligence of Concessionaire;
- b. earthquake; hurricane; flood; act of God; civil commotion occurring on the Concession Area during or in connection with any event or other matter or condition of like nature; or
- c. any law, ordinance, rule, regulation or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, or war.

12.6 Labor Dispute.
In the event of a labor dispute which results in a strike, picket or boycott affecting the Concession Area or operation described in this Agreement, Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining agreements and there has been a final determination of such fact which is not cured by Concessionaire within thirty (30) days.

12.7 Waiver of Loss from Hazards.
The Concessionaire hereby expressly waives all claims against the City for

loss or damage sustained by the Concessionaire resulting from fire, water, natural disasters/acts of God (e.g. hurricane, tornado, etc.), civil commotion, riot, or any other Force Majeure contemplated in Subsection 12.5 and Labor Dispute in Subsection 12.6 above, and the Concessionaire hereby expressly waives all rights, claims, and demands against the City and forever releases and discharges the City of Miami Beach, Florida, from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 13. DEFAULT AND TERMINATION.

Subsections 13.1 through 13.3 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle City to exercise any and all remedies described as City's remedies under this Agreement, including but not limited to those set forth in Subsection 13.4. An event of default by City shall entitle Concessionaire to exercise any and all remedies described as Concessionaire's remedies under this Agreement, including but not limited to those set forth in Subsection 13.5.

13.1 Bankruptcy.

If either the City or Concessionaire shall be adjudged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and shall not be discharged within sixty (60) days after appointment, or if either party shall make an assignment of its property for the benefit of creditors, or shall file a voluntary petition in bankruptcy, or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or if such petitions shall be filed against either party and shall not be dismissed within sixty (60) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.2 Default in Payment.

In the event Concessionaire fails to submit any payment within five (5) days of its due date, there shall be a late charge of \$50.00 per day for such late payment, in addition to interest at the highest rate allowable by law (currently 12% per annum). If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Concession Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.3 Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement, and such failure continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract. In the event that a default is not reasonably susceptible to being

cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof. In the event Concessionaire cures any default pursuant to this Subsection, it shall promptly provide City with written notice of same.

13.4 City's Remedies for Concessionaire's Default.

If any of the events of default, as set forth in this Section 13, shall occur, the City may, after notice (if required) and the expiration of cure periods (as provided above), at its sole option and discretion, institute such proceedings as in its opinion are necessary to cure such defaults and to compensate City for damages resulting from such defaults, including but not limited to the right to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the term of this Agreement shall terminate upon the date specified in such notice from City to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.7. Upon the termination of this Agreement, all rights and interest of Concessionaire in and to the Concession Area and to this Agreement, and every part thereof, shall cease and terminate and City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement. In addition to the rights set forth above, City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under Florida law against Concessionaire; and or
- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages resulting from Concessionaire's default.

13.5 If an event of default by the City, as set forth in this Section 13, shall occur, the Concessionaire may, after notice (if required) and the expiration of the cure periods (as provided above), at its sole option and discretion, terminate this Agreement upon written notice to the City and/or sue for damages. Said termination shall become effective upon receipt of a written notice of termination by the City, but in no event shall Concessionaire specify a termination date that is less than sixty (60) days from the date of the written termination notice. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.7.

13.6 Termination for Convenience/Partial Termination.

13.6.1 Notwithstanding the provisions of this Section 13, this Agreement may be terminated by the City, for convenience and without cause, upon the furnishing of thirty (30) days prior written notice to Concessionaire.

Conversely, this Agreement may be terminated by the

Concessionaire, for convenience and without cause, upon the furnishing of thirty (30) days prior written notice to City.

13.6.2 Concessionaire acknowledges that the City may develop a schedule of capital improvements for the right-of-way, including all or a portion of the Concession Area, which may entail a closure of all or a portion of the right-of-way and Concession Area, at the City Commission's sole discretion. In the event that the City closes down the right-of-way, or any other portion of the Concession Area, for the purpose of undertaking a capital improvement plan thereon, then the parties agree that that portion of the Agreement referencing said individual Concession Area shall be partially terminated for convenience, without cause and without penalty to either party, and only as to that portion of the Concession Area which has been closed. Such a termination shall become effective upon thirty (30) days prior written notice to Concessionaire.

13.6.3 In the event of termination or partial termination by City of the Agreement pursuant to this Subsection, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants and employees (including, but not limited to, claims for interference in business or damages for interruption of services or interference in its concession operations by Concessionaire or its vendors). However, if it is determined, via a contract year end-review, that a partial termination results in a substantial decrease to the estimated gross revenues derived by the Concessionaire, then Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the percentage of Concession Area that was partially terminated and for the period of time of said partial termination.

13.6.4 In the event of termination for convenience by Concessionaire pursuant to Subsection 13.6.1, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants and employees. Moreover, Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the period of time of remaining on the currently remaining term of this Agreement.

13.7 Surrender of Concession Area.

At the expiration of this Agreement, or in the event of a partial termination or termination of the entire Agreement, Concessionaire shall surrender the Concession Area (or portion thereof in the event of a partial termination) in the same condition as the Concession Area was prior to the commencement of this Agreement, reasonable wear and tear excepted. Concessionaire shall remove all its facilities, equipment, fixtures, personal property, etc. upon two (2) hours written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other

termination of this Agreement. Continued occupancy of the Concession Area (or portion thereof) after termination (or partial termination) of the Agreement shall constitute trespass by the Concessionaire, and may be prosecuted as such. In addition, the Concessionaire shall pay to the City one thousand dollars (\$1,000) per day as liquidated damages for such trespass and holding over.

SECTION 14. PERFORMANCE BOND OR ALTERNATE SECURITY.

Intentionally Omitted.

SECTION 15. ASSIGNMENT.

Except as otherwise provided in this Subsection, or in the Agreement, Concessionaire shall not assign, sublease, grant any concession or license, permit the use of by any other person other than Concessionaire, or otherwise transfer all or any portion of this Agreement and/or of the Concession Area (all of the forgoing are herein after referred to collectively as "transfers"), without the prior written consent of the City.

Concessionaire shall notify the City Manager or his designee of any proposed transfer, prior to consummation of same and the City or the City Manager or his designee, as applicable, shall respond within thirty (30) days. In the event that any such transfer is approved, the transferee shall agree to be bound by all the covenants of this Agreement required of the transferor hereunder. Any transfer made without complying with this Section shall be null, void, and of no effect and shall constitute an act of default under this Agreement. Notwithstanding any such consent, or any permitted transfer under any provision of this Section, unless expressly released by the City, Concessionaire shall remain jointly and severally liable (along with each approved transferee, who shall automatically become liable for all obligations of the transferor hereunder with respect to that portion of the Agreement so transferred), and the City shall be permitted to enforce the provisions of this Agreement directly against Concessionaire or any transferee of the Concessionaire without proceeding in any way against any other person.

For purposes of this Section 15, Concessionaire's selection of vendors for the Market shall not be deemed a transfer.

SECTION 16. SPECIAL EVENTS.

- 16.1 Concessionaire's proposed uses, as set forth in Section 3 herein, do not contemplate the production, promotion or sponsorship by the Concessionaire of special events in any portion of the Concession Area. In the event Concessionaire does produce, promote or sponsor a special event in the Concession Area, it shall abide by the City's Special Events Permit Requirements and Guidelines. For any use, other than those provided for in this Agreement, a Special Events Permit may be required and shall be obtained through the City's Department of Tourism and Cultural Development. The City Manager's authorization must be obtained for any such special event.

The City Administration shall evaluate requests for Special Events Permits on a case by case basis, in accordance with the City's Special Event Permit Requirements and Guidelines.

In the event that a special event and/or film permit is requested by an entity, other than the Concessionaire, and the proposed special event and/or film production is scheduled to occur within all or a portion of the Concession Area, the Concessionaire agrees to cooperate with the City and the special event permit applicant to allow use of the Concession Area during the period of the special event, including set-up and break-down time.

16.2

City Special Events.

Notwithstanding Subsection 16.1 above, and in the event that the City, at its sole discretion, deems that it would be in the best interest of the City, the City reserves the right to displace the Concessionaire for City produced special events and/or other City produced productions. In such cases, the City may request that the Concessionaire cease and desist operations during the term of, and in the area of, the special event and/or production, and the Concessionaire shall cease and desist during said term. In the event that it is determined, via a contract year end-review, that ceasing and desisting of concession operations, as stated herein, results in a decrease to the estimated gross revenues derived by the Concessionaire, then Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the percentage of reduced hours of operation caused by said special event and/or production. If the Concessionaire is not required to close, or chooses to remain open without interference to the special event and/or production, Concessionaire agrees to cooperate with the City. If the Concessionaire is allowed to remain open during special events and/or productions, the Concessionaire may be allowed to have in operation its normal daily complement of facilities and vendors. "Normal" shall be defined as facilities and vendors, as approved by the City, that the Concessionaire has available for the public on a normal business day. Such facilities and vendors shall not be increased or altered during special events and/or productions without the prior written permission of the City Manager or his designee. To the extent that the normal business day complement of facilities and vendors is displaced by the special event and/or production, the Concessionaire may reallocate such displaced facilities and vendors on a pro-rata basis within an area of the Concession Area not being utilized by the special event and/or production.

For purposes of this Section 16, "normal business day" shall be defined as set forth in Section 9 herein, entitled "Schedule of Operations".

16.3

Notwithstanding anything to the contrary, if a special event occurs in all or any portion of any Concession Area, Concessionaire shall not be liable for any charge, fee or other expense, governmental or otherwise, in connection with such special event.

16.4

Street Vendors / Street Performers.

Any locations within the Concession Area identified by the City for non-Concessionaire sponsored street vendors and/or street performers, in accordance with City of Miami Beach Ordinance No. 2002-3366, as may be amended from time to time, or otherwise in accordance with the City's respective rules, regulations, and guidelines associated therewith, as same may also be amended from time to time, are excluded from this Agreement,

and Concessionaire shall not interfere or otherwise prohibit said street vendors and/or street performers' activities upon such designated portions of the public right-of-way. Similarly, Concessionaire shall not prohibit or otherwise interfere with the activities of any street vendors and/or street performers who may not be part of a City of Miami Beach permitted process, but who may have certain constitutionally protected rights to perform and/or offer for sale their wares on public rights-of-way.

SECTION 17. NO IMPROPER USE.

The Concessionaire will not use, nor suffer or permit any person to use in any manner whatsoever, the Concession Area, operations, or facilities for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or Municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. The Concessionaire will protect, indemnify, and forever save and keep harmless the City, its agents, employees and contractors from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any act, neglect or omission of the Concessionaire, its vendors, employees, agents, and/or subcontractors regarding the Concession. In the event of any violation by the Concessionaire, or if the City or its authorized representative shall deem any conduct on the part of the Concessionaire, its vendors, agents, employees and/or subcontractors, to be objectionable or improper, the City shall have the option, at its sole discretion, to either (i) automatically terminate the Agreement, upon prior written notice to Concessionaire, or to (ii) suspend the concession operations should the Concessionaire fail to correct any such violation, conduct, or practice to the satisfaction of the City within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice, and such suspension shall continue until the violation is cured. The Concessionaire further agrees not to commence operations during the suspension until the violation has been corrected to the satisfaction of the City.

SECTION 18. PRICE SCHEDULES.

Intentionally Omitted.

SECTION 19. NOTICES.

All notices from the City to the Concessionaire shall be deemed duly served upon receipt, if mailed by registered or certified mail with a return receipt to the Concessionaire at the following address:

Ms. Claire Tomlin
The Market Company
428 Espanola Way
Miami Beach, Florida 33133

All notices from the Concessionaire to the City shall be deemed duly served upon receipt, if mailed by registered or certified mail, return receipt requested, to the City of Miami Beach at the following addresses:

City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

The Concessionaire and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Concession Agreement must be in writing.

SECTION 20. LAWS.

20.1 Compliance.

Concessionaire shall comply with all applicable City, Miami-Dade County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations.

20.2 Governing Law.

This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Florida. In case of any inconsistency between the terms of this Agreement, and any applicable general or special law, said general or special law shall govern, unless otherwise provided herein.

20.3 Equal Employment Opportunity.

Neither Concessionaire nor any affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, sexual orientation, and disability, as defined in Title I of ADA. Concessionaire will take affirmative steps to utilize minorities and females in the work force and in correlative business enterprises.

20.4 No Discrimination.

The Concessionaire agrees that there shall be no discrimination as to race, sex, sexual orientation, color, creed, national origin, familial status, religion or handicap, in its employment practice or in the operations referred to by this Concession Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation within the Concession Area. All concession operations and services offered shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the operations and the facilities.

- 20.4.1 Pursuant to Sections 62-90 and 62-91, of Chapter 62, of the Miami Beach City Code entitled "Human Relations", Concessionaire, by executing this Agreement, certifies that it does not discriminate in its membership or policies based on race, color, national origin, religion, sex, sexual orientation, familial status or handicap.

SECTION 21. MISCELLANEOUS.

21.1 No Partnership.

Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the City and Concessionaire.

- 21.2 Modifications.
This Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved by the Mayor and City Commission except where such authority has been expressly provided herein to the City Manager or his designee.
- 21.3 Complete Agreement.
This Agreement, together with all exhibits incorporated hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to Concessionaire's operations, as contemplated herein.
- 21.4 Headings.
The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.
- 21.5 Binding Effect.
This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.
- 21.6 Clauses.
The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.
- 21.7 Severability.
If any provision of this Agreement or any portion of such provision or the application thereof to any person or circumstance shall be held to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement as so modified shall.
- 21.8 Right of Entry.
The City, at the direction of the City Manager, shall at all times during days and hours of operation, have the right to enter into and upon any and all parts of the Concession Area for the purposes of examining the same for any reason relating to the obligations of parties to this Agreement.
- 21.9 Not a Lease.
It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the Concessionaire, that it is a concessionaire and not a lessee; that the Concessionaire's right to operate the concession shall continue only so long as this Agreement remains in

effect.

21.10

Signage.

Concessionaire shall provide, at its sole cost and expense, any required signs at its concessions. All advertising, signage and postings shall be approved, in writing, by the City in its proprietary capacity, and shall be in accordance with all applicable Municipal, County, State and Federal laws and regulations. Any signage posted by Concessionaire on its facilities and equipment shall be subject to the prior approval of the City as to size, shape and placement of same.

21.11

Use of the Right-of-Way.

The right-of-way is for the use and enjoyment of the public and the public's right to such use shall not be infringed upon by any activity of the Concessionaire. Upon execution of this Agreement, Concessionaire acknowledges that all of the rights-of-way within the Concession Area are public, and as such, concession operations must not restrict, or appear to restrict, access to the general public, or in any way limit the public nature or ambiance of the adjacent area. The Concessionaire will conduct its operations so as to maintain a reasonably quiet and tranquil environment for the adjacent area, and make no public disturbances.

21.12

Conflict of Interest.

Concessionaire shall perform its services under this Agreement and conduct the concession operations contemplated herein, in a manner so as to show no preference for other concession operations/facilities owned, operated, managed, or otherwise controlled by Concessionaire with regard to its responsibilities pursuant to this Concession Agreement.

21.13

Reasonableness.

Notwithstanding anything to the contrary in this Agreement, including but not limited to references to "sole option" or "sole discretion" or words of similar meaning, in each instance in which the approval or consent or other action of the City Commission or the City Manager or his designee is allowed or required in this Agreement, such approval, consent or other action shall not be unreasonably withheld, conditioned or delayed.

21.14

Procedure for Approvals and/or Consents.

Intentionally Omitted.

21.15

No Waiver.

No waiver of any covenant or condition of this Agreement by either party shall be deemed to imply or constitute a waiver in the future of the same covenant or condition or of any other covenant or condition of this Agreement.

21.16

No Third Party Beneficiary.

Nothing in this Agreement shall confer upon any person or entity, including, but not limited to subconcessionaires, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by

reason of this Agreement.

21.17 Attorneys' Fees.

If it becomes necessary for City or Concessionaire to enforce their respective rights under this Agreement or any part hereof through litigation, Concessionaire and City agree that the prevailing party shall be entitled to recover from the other party all costs and expenses of such litigation, including a reasonable attorneys' fee and costs, for all trial and appellate proceedings.

SECTION 22. LIMITATION OF LIABILITY.

The City desires to enter into this Agreement only if in so doing the City can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of \$10,000.00. Concessionaire hereby expresses its willingness to enter into this Agreement with a \$10,000.00 limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the separate consideration of \$10.00, the receipt of which is hereby acknowledged, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of \$10,000.00, for any action for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of limitation placed upon the City's liability as set forth in Florida Statutes, Section 68.28.

SECTION 23. VENUE.

This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONCESSIONAIRE MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA(S).**

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed, all as of the day and year first above written, indicating their agreement.

PASSED AND ADOPTED THIS _____, 2004.

Attest:

CITY OF MIAMI BEACH

CITY CLERK

MAYOR

Witness:

THE MARKET COMPANY, INC.

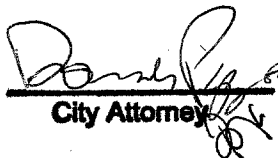
Signature

Name and Title of Signatory

JMG/CMC/JD/rlr

F:\DDHP\ALL\ASSET\Markets\EspanolaWay\EspanolaWayConcessionAgreement.Final.doc

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**



City Attorney

3/12/04
Date

(Page 1 of 2)
Site Plan



EXHIBIT 2.0

(Page 2 of 2)

CITY OF MIAMI BEACH FIRE DEPARTMENT Fire Prevention Division

To: Robert Reboso

From: Captain Glenda Guise

Date: 2/11/04

Subject: Espanola Way Market comments

This memo is regarding the proposed placement of vending booths at the Espanola Way Marketplace. Pursuant to the onsite inspection conducted on February 7, 2004, the following are the Fire Department's comments and requirements. Be advised that these are a bit of a compromise from the original recommendations and are subject to modification if a serious problem is encountered or brought to light in the future.

- The 12' clearance on the roadway between the display tables will be maintained along the length of Espanola Way. The tables will be placed in the indented parking spaces. This can be monitored by keeping the front legs of the tables at least one foot back from the asphalt pavement (the middle of the concrete gutter). It is understood that where there are no parking spaces, tables will not be permitted on the roadway as there is no practical space for them to stay within the limits.
- The light-weight shade tents shall have the back leg support up on the sidewalk/curb and the front leg may be at the outer edge of the concrete gutter. Legs may not be on the black asphalt. This maintains the 10' clearance proposed by Commissioner Garcia. While maintaining 12' clearance for the heavier tables. In the event of an emergent need for access to the street, the tents may easily be slid back the extra foot. Please instruct the vendors on this procedure.
- The intersection of Espanola Way and Drexel must still maintain the 12' clearance measured perpendicular to the curb and street. The proposed booth at the northeast corner may be placed on a diagonal to maintain the corner.
- Five mobile push carts shall be permitted along the length of the street. The push carts shall be true "flower cart"-type push carts, with large wheels and a handle, not to exceed 3' x 5', with an attached umbrella, as opposed to tables on wheels. They shall be manned at all times and shall be stored off of the street during the hours when the market is closed. No merchandise or other supplies to the cart may be stored on the street. All accessories must be mobile and on the cart.
- Access to the public school must be maintained, do not block gates.
- Hydrants must be maintained accessible and cannot be blocked in any manner.
- It is understood that the booths, tents and merchandise will be cleared from the street each night when the market closes.
- The booths at the intersection of Espanola Way and Drexel Ave. will have to be reevaluated in the future with the construction of the proposed fountain.
- Should any conditions change on the street in the future, modifications to this plan will be made as needed.

If you have further questions, please contact me by email at glendaguise@miamibeachfl.gov or by phone at 305-673-7123.

EXHIBIT 3.1

(Rental Fee Schedule)

The Market Company Inc.

November 14, 2003

Re: Espanola Way Weekend Festival / Seasonal Fees

Dear Vendor:

Thank you for your continued participation in the Espanola Way Weekend Festival every weekend. The seasonal rates have been calculated and your fee beginning December 1, 2003 is going to be:

MAIN	Friday night	: 30.00 + 5.00 + 2.10 = \$ 37.10
	Saturday day (400 block)	: 55.00 + 5.00 + 3.85 = \$ 63.85
	Saturday night (400 block)	: 50.00 + 5.00 + 3.50 = \$ 58.50
	Saturday day + night (400 block)	: 80.00 + 10.00 + 5.60 = \$ 95.60
DREXEL	Sunday	: 60.00 + 5.00 + 4.20 = \$ 69.20
	Saturday (Drexel Ave)	: 60.00 + 5.00 + 4.20 = \$ 69.20
	Sunday (Drexel Ave)	: 55.00 + 5.00 + 3.85 = \$ 63.85

Sincerely,

Claire Tomlin

Seasonal Rates:
December 1 - May 31
These rates are reduced
approximately 20% for the
months June - November.

Mailing: 238 East San Marino Drive, Miami Beach, FL 33139 • Business Location: 419C Espanola Way, Miami Beach, FL 33139
Tel: 305 531 0038 • Fax: 305 532 0062 • www.themarketcompany.org

EXHIBIT 3.1.1

(Facilities Design)



EXHIBIT 3.1.2.1

(Page 1 of 2)

(Special Events Disability Access Punch List)

Special Events Disability Access Punch List

1. Ensure curb cuts and cross walks are kept free and clear for usage, with a continuous accessible route of 44 inches in width.
2. The Event Producer must ensure that any nearby accessible on- or off-street parking ("handicapped parking") is not obstructed by vehicles loading/unloading equipment, etc. If such obstructions occur, the Event Producer must see that such obstructions are removed immediately. Accessible parking spaces shall be connected to the site's continuous accessible route, with no obstructions between the accessible parking spaces and the curb ramps that serve those spaces.
3. Any and all accessible routes created and/or installed by the Event Producer, or under the Event Producer's supervision, must have no abrupt change in level in excess of $\frac{1}{4}$ inch. Where such changes in level are present, properly bevel the change in level at a 1:2 ratio or provide a ramp with a slope not to exceed a 1:12 ratio. This is necessary to allow passage of wheelchairs or strollers and prevent tripping or the catching of walkers and canes. Any ramps provided must be in compliance with all Florida Accessibility Code requirements, including, but not limited to, requirements regarding edge protection, handrails, and surface.
4. Provide a smooth transition between temporary pathways and any ramps, sidewalks, streets, or parking lots. This means no change in level exceeding $\frac{1}{4}$ inch. Any change exceeding $\frac{1}{4}$ inch requires beveling at a 1:2 ratio or the installation of a ramp with a slope not to exceed a 1:12 ratio. Any ramps provided must be in compliance with all Florida Accessibility Code requirements, including, but not limited to, requirements regarding edge protection, handrails, and surface.
5. All cashier counters (counters where money transactions occur) must be no higher than 36 inches maximum above finish floor, for a minimum length of 36 inches.
6. Maintain an accessible route for access to merchandise that is both within a vendor space, as well as merchandise not contained within a vendor space. If the overflow of merchandise for patron viewing is placed behind a booth, then provide adjacent access to the merchandise via a curb ramp, as well as the placement of a pathway with a stable and firm surface necessary for the use of wheelchairs and mobility aids.
7. Merchandise for display should be within a line of sight no higher than 48 inches for persons of short stature or wheelchair users. If merchandise is

EXHIBIT 3.1.2.1

(Page 2 of 2)

(Special Events Disability Access Punch List)

displayed higher than 48 inches, merchant must provide assistance to disabled customers in order to reach items.

8. All vendor spaces shall be located on an accessible route that is a minimum of 44 inches wide.
9. If tables and seating are provided for the consumption of food, all aisles adjacent to accessible fixed seating shall provide 30 inch by 48 inch clear floor space for wheelchairs. Where there are open positions along both sides of such aisles, the aisles shall be not less than 52 inches wide.
10. For wheelchair seating spaces provided at tables or counters, knee spaces at least 27 inches high, 30 inches wide, and 19 inches deep shall be provided. The tops of accessible tables and counters shall be from 28 inches to 34 inches above the finish floor or ground.
11. Where food or drink is served at counters exceeding 34 inches in height for consumption by customers seated on stools or standing at the counter, a portion of the main counter which is 60 inches in length minimum shall be provided in compliance with the requirements of Items #9 and #10 above, or service shall be available at accessible tables within the same area.
12. Where portable toilets are provided, an accessible route shall be provided to the toilets. Five percent of the total number of toilets must be accessible. If clusters of portable toilets are distributed throughout the site, then each cluster must have accessible units.
13. If general assembly seating or standing space is provided for audience members attending a public performance at a special event, reserved wheelchair seating must be provided. Such seating must be provided in a location that allows wheelchair users an unobstructed line of sight to the stage. If seating capacity accommodates greater than 300 persons, then accessible seating shall be dispersed throughout the venue.

EXHIBIT 3.2.1

(Arts and Crafts)

Merchandise Sold at The Espanola Way Weekend Festival

Art

Paintings, photography, sculpture, mobiles, wood carvings, etc.

Crafts

Items made by a particular culture; i.e. lace, woven products, jewelry, etc.

Watches

Jewelry

Clothes

Purses

Shoes

Sunglasses

Belts

Cards

Gift Items

Vintage clothes

Photographs

Belly Dancing Gear

Pillows

Incense

And other miscellaneous items

EXHIBIT A

(Page 1 of 6)
(Vendor Guidelines)

The Market Company, Inc.
428 Española Way - Miami Beach, FL 33139
(305) 531-0038 t. - (305) 532-0082 f.

Vendor Guidelines

Definition of Vendor: All persons participating in a market. Merchants who own stores and participate in a market are also vendors and must follow vendor guidelines.

Market Location:

☐ Lincoln Road ☐ Espanola ☐ North Beach ☐ FestivArt ☐ Other _____

Market Days:

☐ Friday ☐ Saturday ☐ Sunday ☐ Monday

Market Hours:

_____ a.m. to _____ p.m. Sales stop at closing time.
or: _____ p.m. to _____ a.m. Sales stop at closing time.

Market Set-up:

as early as: _____ a.m. Street must be clear by _____ p.m.
or: _____ p.m. Street must be clear by _____ a.m.

The Market Company has a permit with the City of Miami Beach which designates set-up and break-down times. It is imperative that vendors follow these time guidelines. Vendors who do not follow the guidelines will be fined \$50 for the first offense, \$100 for the second offense and thereafter will not be allowed to return to the market.

Fee: \$ _____ + Sales Tax: \$ _____ + Insurance: \$ _____ = Total: \$ _____

Market Fees: Market fees must be paid in advance by the close of the day on the Thursday before the market is to be held. Fees can be paid in cash, check or credit card (automatic credit card deductions can be arranged). Payment is made at The Market Company office at 428 Española Way. This payment guarantees a reserved space in the market. If a vendor cannot attend a market for which payment has been made, cancellation made 48 hours in advance will transfer paid funds to the next market date. Funds will be forfeited if cancellation is not made.

Vendors who do not pay in advance but choose to come and obtain an unreserved space will pay prior to set up and will be assigned a space on a first come first served basis determined by the number of spaces available.

Markets Operate Rain or Shine. If a vendor elects to set up for product sales, even if rain reduces sales, a minimum fee of 50% will be charged. In the case of advanced payment, if a vendor questions whether a market will be set up due to rain, he should call the market coordinator to protect his funds.

Vendor Spaces are Assigned by The Market Company: Vendors are expected to attend each weekend. If a vendor misses two market days without notice his assigned space will be forfeited and he will re-apply for a market space.

EXHIBIT A

(Page 2 of 6)
(Vendor Guidelines)

Additional Markets: Vendors are welcomed to participate in multiple markets. For a vendor to be eligible to be in additional markets he must be prepared to stay in his original marketplace and apply to the additional markets.

Vendor Display Area: Vendors furnish their own tents, umbrellas, tables, cloths, carts, chairs, displays, trash cans, brooms and trash bags. Market standards are white 10x10 tents (Insta-shade, EZUp), green market umbrellas with stands and green table skirts (Dade Towel - 305/751-1284 \$ 3.75 linear foot). Market aesthetics are very important. Describe your area:

Tents and Umbrellas: Vendor's tents and umbrellas must be weighed down immediately after set-up. Immediately following set-up of tables, the table skirts must be installed. Vendors who do not follow these rules will be fined: \$50/first offense, \$100/second offense and thereafter not allowed to participate in a market.

Vendors Who Need Electricity: Vendors who need electricity may make a request to The Market Company representative for access to an approved electrical outlet. Vendors must provide heavy-duty grounded cords and a heavy-duty grounded connector. Cords exposed on the sidewalk or street must be covered with plastic heavy-duty covers and duck-taped in place. Vendors who provide light can use up to 300 watts per 10'x10' booth. If a vendor does not follow the guidelines for the use of electricity, the following fines will be instituted: \$50/first offense, \$100/second offense and thereafter the vendor will not be permitted participation.

Vendors Are Allowed A 10'x10' Space: All tables must fit within the 10'x10' space.

Vendor Behavior: Vendors must dress appropriately with shirts on at all times. Alcoholic beverage consumption by vendors is not allowed. Please see Vendor Rules & Regulations.

Vendor Clean-up: Vendors are responsible for removal of all trash related to their stand. They are not to use public trash cans. They are to remove trash from the street. Vendors are advised to bring their own trash receptacle and broom. If a vendor leaves trash he will be fined \$50/first offense. A second offense will cost \$100. Thereafter the vendor will not be allowed to participate in the market.

Vendor Rental Procedure: An appointment must be made with The Market Company to review the guidelines. The Market Company application and agreement must be completed and signed. Upon acceptance vendor will be allowed to participate in the market.

Signs/Pricing: No handwritten signs are allowed. Products must be priced either individually, by basket/crate or on a posted sign. Signs will be on white background only. The Market Company can recommend a sign maker.

State Sales Tax and Food Handling Permits: Vendors must provide The Market Company with a copy of all such licenses required prior to joining the market. In the case of a food handling license, vendors must provide monthly renewal prior to returning to the market. If a vendor does not follow the state guidelines for food handling they must leave the market.

Parking: Following loading/unloading, vendor's vehicles must be removed from loading/unloading area.

EXHIBIT A

(Page 3 of 6)
(Vendor Guidelines)

Agreement with Relevant Associations: The markets are designed as economic development for the area in which they are located. If there is a complaint from a business about a particular vendor selling products that interfere with his business The Market Company may have to ask a vendor to no longer participate in the event.

Lincoln Road, North Beach, Espanola Way and Espanola Way FestivArt and other markets.

Insurance: The Market Company has liability insurance in the amount of \$ 1,000,000 pursuant to permit requirements of the City of Miami Beach. Vendors must provide proof of insurance for their participation in the market which covers property damage, personal injury and product liability in the amount of \$1,000,000. This proof of insurance must accompany vendor's application. Most farm/business policies cover activities at the market. Check with your insurance carrier. If a vendor does not have insurance and cannot provide proof, he will be responsible for paying The Market Company \$ 5.00 each day to cover his property damage and personal injury liability. If he sells edible products which require product liability he will be responsible for paying \$ 8.00 each day which includes property damage, personal injury and product liability. Coverage is up to one million dollars in liability. Each vendor will sign an agreement accepting responsibility for any damages over one million dollars and agrees to hold harmless and indemnify The Market Company, its owners, agents and employees and The City of Miami Beach from any and all liability arising from participation and sales in the market.

EXHIBIT A

(Page 4 of 6)
(Vendor Guidelines)



Miami's Premier Special Events and Festival Company

428 Española Way - Miami Beach, FL 33139 - 305-531-0038

Addendum to the Market Company Vendor Guidelines Vendor Rules & Regulations

In order to provide a safe, secure and pleasant environment, The Market Company requests your cooperation in complying with the following vendor rules and regulations:

1. The use of profanity, loud, rude, disruptive or threatening behavior by any vendor or participant in the market is strictly prohibited.
2. Appropriate dress, including shirts and shoes or sandals, must be worn at all times.
3. No booth may be left unattended at anytime.
4. Smoking while manning a booth is strictly prohibited.
5. The playing of loud radios that disturb the pleasant shopping experience is strictly prohibited.
6. Taking unauthorized photographs or videos of vendors or their property is strictly prohibited.
7. The display, selling or soliciting of anything pornographic in nature is strictly prohibited.
8. Possession/consumption of alcoholic beverages and/or illegal substances is strictly prohibited.
9. The carrying of weapon(s) of any kind, possession of any item defined as a weapon, whether illegal or not is strictly prohibited.

I understand and accept the conditions set forth in the Market Company Vendor Guidelines and the Market Company Vendor Rules and Regulations.

Signed: _____ Date: _____

Your cooperation in abiding by the Market Company Vendor Guidelines and Vendor Rules and Regulations is appreciated. The Market Company or its designee, reserves the right to request that those who refuse to comply with the above conditions leave the market immediately.

EXHIBIT A

(Page 5 of 6)
(Vendor Guidelines)



Miami's Premier Special Events and Festival Company

The Market Company, Inc. - 428 Española Way - Miami Beach, Florida 33139

SUBJECT: LETTER OF TERMINATION AS A VENDOR IN THE MARKET.

To Whom It May Concern:

This is to advise you that I,
do hereby resign my right to participate as a vendor in the market(s) presented by
The Market Company, effective immediately, because I have violated the terms of
agreement as set forth in the Vendor Guidelines and Vendor Rules and Regulations.
Such terms were agreed upon in the Last Chance Agreement which I signed on

Sincerely,

EXHIBIT A

(Page 6 of 6)
(Vendor Guidelines)

The Market Company, Inc.
428 Española Way - Miami Beach, FL 33139
(305) 531-0038 L - (305) 532-0082 F.

APPLICATION & AGREEMENT

Applicant: _____

Address: _____

City: _____ State: _____ ZIP CODE: _____

Business Name: _____ State of Florida Sales Tax #: _____

Phone: _____ E-mail: _____

Fax: _____ Cell: _____

Pager: _____

☐ North Beach ☐ Lincoln Rd ☐ FestivArt ☐ Espanola Way ☐ Other _____

Merchandise to be sold: _____

(Please continue on back of this page if necessary and initial your work).

I hereby agree to sell only such items which are listed on the application. I swear that all information is correct and complete. I hereby affirm that I have read the regulations and policies as outlined and agree to abide by all rules establishes for the operation of the markets. I further acknowledge that I am an independent contractor and take full responsibility for all activities conducted throughout the term of this permit and have property damage, personal injury and product liability insurance in the amount of \$1,000,000 and agree to hold harmless and indemnify The Market Company, its owners, agents and employees, and the City of Miami Beach from any and all liability arising from participation and sales in the market.

Fee: \$ _____ + Tax: \$ _____ + Insurance: \$ _____ = Total \$ _____

Name: _____ Signature: _____

Date: ____/____/____ Approved: _____

Claire Tomlin/The Market Company, Inc.

Note: Violation or falsification of any of the conditions set forth in this legal agreement will result in the immediate and permanent loss of permission to sell any product at a market sponsored by The Market Company, Inc.

EXHIBIT B

(Page 1 of 2)

(USDA Farmers Market Operating Guidelines)

Guidelines

Page 1 of 2

USDA Farmers Market Operating Guidelines

1. **Market Day, Time and Site:** The Market will be held every Friday from 10:00 a.m. to 2:00 p.m. in parking court #9 of USDA located on the corner of 12th Street and Independence Avenue, SW, Washington, D.C. Selling will not begin before 10:00 a.m. and will end promptly at 2:00 p.m. each market day. Due to space restrictions, latecomers will be located at Market Management's discretion. All vehicles must vacate the market site no later than 3:00 p.m.
2. **Producer-Only:** Farmers will only sell products which they grow or produce themselves.
3. **Products To Be Sold:** Fresh, high-quality fruits, vegetables, herbs, honey, jams and jellies, cheese, vinegars, cider, maple syrup, flowers, bedding plants, and potted plants may be available at the Market. Value-added products will be admitted at the discretion of Market Management.
4. **Commitment to Market:** Farmers/vendors must commit to the entire market season and participate on a regular basis. Product availability may limit participants' beginning and ending dates; therefore, a schedule will be developed prior to the start of the market season documenting the farmer/vendor commitment to the Market.
5. **Notification of Attendance:** Farmers/vendors must call within 48 hours of a market day if they cannot attend. Failure to provide proper notification may result in termination of farmer/vendor participation at the market.
6. **Gleaning:** Farmers/vendors must commit to supporting the USDA food gleaning/food recovery initiative in lieu of paying an entrance fee. This commitment requires farmers and vendors to donate surplus food and food products at the end of each market to a local nonprofit organization identified by USDA.
7. **Tax Deductions for Gleaning:** Questions about tax deductions for gleaning should be referred to the Internal Revenue Service or a tax advisor. Receipts for donated foods may be obtained from the receiving nonprofit organization.
8. **Space:** One vehicle is permitted per space; all other vehicles must be removed from the immediate market premises. One space is 16 x 17 feet, and all trucks must fit within that area. (Exception: ice cream vendor)
9. **Signage:** Farmers/vendors must clearly display the name of their farm/business and post prices for all items being sold.
10. **Clean-up:** Farmers/vendors are responsible for cleaning all trash and waste within and

EXHIBIT B

(Page 2 of 2)

(USDA Farmers Market Operating Guidelines)

Guidelines

Page 2 of 2

around their allotted space. Garbage bins are provided on the market site for this purpose.

11. Applications: All new and returning farmers/vendors must complete an application each year listing the types of products to be sold during the season. This helps to correct any changes to a farm/business in the past year and also helps to ensure a good product mix will be offered at the Market.

12. Farm/Business Visits: USDA Farmers Market Management may visit farm/business locations to verify compliance with Market criteria and guidelines. Farmers/vendors should submit a map and directions to their farm/business location along with the Market application.

13. Noncompliance: The U.S. Department of Agriculture reserves the right to refuse acceptance of any vendor or item that is not in keeping with the rules or quality of USDA criteria and guidelines.

VENDOR CERTIFICATION

(Please detach, sign and return this page to USDA Farmers Market Management)

By signing below, I certify that I have read, understand and will adhere to all applicable guidelines as stated in this document. I further understand that should I fail to comply with these specified guidelines, my participation in the USDA Farmers Market could be terminated.

Signature of Farmer/Vendor

Date

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND THE MARKET COMPANY, INC., FOR THE MANAGEMENT AND OPERATION OF A GREEN MARKET IN THAT PORTION OF THE LINCOLN ROAD PUBLIC RIGHT-OF-WAY, BETWEEN DREXEL AVENUE AND LENOX AVENUE; SAID AGREEMENT HAVING AN INITIAL TERM OF ONE (1) YEAR, COMMENCING ON APRIL 1, 2004, AND EXPIRING ON MARCH 31, 2005, WITH AN OPTION TO RENEW, AT THE CITY'S SOLE DISCRETION, FOR AN ADDITIONAL ONE YEAR TERM, SUBJECT TO THE TERMS PROVIDED IN THE AGREEMENT

WHEREAS, on July 31, 2002, the Mayor and City Commission adopted Resolution No. 2002-24947, approving the issuance of Request for Proposals No. 57-01/02, for the operation and management of a green market on a portion of the Lincoln Road right of way, a street market on a portion of the Espanola Way right-of-way, and a street-market on Normandy Island on Rue Vendome (the RFP); and

WHEREAS, said RFP was issued, proposals were received from interested parties, and after an evaluation and selection process, recommendations were forwarded to the Mayor and City Commission; and

WHEREAS, on March 19, 2003, via Resolution 2003-25154, the Mayor and City Commission approved the selection of The Market Company, Inc. (Market Company) and authorized the City Administration to negotiate three (3) separate concession agreements for a: 1) Lincoln Road Green Market; 2) Espanola Way Street Market; and 3) Normandy Village Street Market; and

WHEREAS, the Administration has negotiated with The Market Company and agreement has been attained with regard to the Lincoln Road Green Market Concession Agreement, as attached hereto; and

WHEREAS, said Agreement has an initial term of one (1) year, commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one (1) year term; and

WHEREAS, said Concession Agreement is also terminable for convenience by either party and without cause, upon thirty (30) days written notice to the other party.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission approve and authorize the Mayor and City Clerk to execute the attached

Concession Agreement by and between the City Of Miami Beach and the Market Company, Inc., for the Management and Operation of a Green Market in that Portion of the Lincoln Road Public Right-of-Way, between Drexel Avenue and Lenox Avenue; said Agreement having an initial term of one (1) year, commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one year term, subject to the terms provided in the Agreement.

PASSED AND ADOPTED THIS 17th day of March 2004.

CITY CLERK

MAYOR

JMG:CMC:JD:rlr

F:\DDHP\ALL\ASSET\MARKETS\LINCOLNROAD\LINCOLNMARKET.RES.DOC

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**



City Attorney



Date

**The Market
Company, Inc.**

**Management and
Operation Agreement
for the
Lincoln Road
Green Market**

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**CONCESSION AGREEMENT BETWEEN
CITY OF MIAMI BEACH, FLORIDA AND
THE MARKET COMPANY, INC.
FOR MANAGEMENT AND OPERATION OF THE
LINCOLN ROAD GREEN MARKET
PURSUANT TO REQUEST FOR PROPOSALS NO. 67-01/02**

THIS AGREEMENT made the _____ day of _____, 2004, between the **CITY OF MIAMI BEACH**, a municipal corporation of the State of Florida (hereinafter called "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **THE MARKET COMPANY, INC.**, a corporation established pursuant to the laws of the State of Florida, with offices at 428 Espanola Way, Miami Beach, Florida 33139 (hereinafter called "Concessionaire").

WITNESSETH

WHEREAS, on July 31, 2002, the Mayor and City Commission adopted Resolution No. 2002-24947, authorizing the Administration to issue a Request for Proposals (RFP) for the management and operation of street markets at various locations within the City; and

WHEREAS, on August 20, 2003, said RFP was issued, responses were received and evaluated, and recommendations were forwarded to the Mayor and City Commission; and

WHEREAS, on March 19, 2003, the Mayor and City Commission adopted Resolution No. 2003-25154, authorizing the Administration to enter into negotiations, via three (3) separate concession agreements, with The Market Company, Inc. (Concessionaire) for the operation and management of street markets on 1) Lincoln Road, 2) Espanola Way and 3) Normandy Village; and

WHEREAS, the Administration has successfully negotiated the foregoing Concession Agreement with The Market Company, Inc., for the operation and management of the Lincoln Road Green Market, on a portion of the public right-of-way known as Lincoln Road (between Lenox Avenue and Drexel Avenue), said Agreement commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one (1) year term.

NOW THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained and other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, it is agreed by the parties hereto as follows:

The City hereby grants to the Concessionaire, and the Concessionaire hereby accepts from the City, the exclusive right to operate the following described concession within the Concession Area, as defined herein, in conformance with the purposes and for the period stated herein, and subject to all the terms and conditions herein contained and fairly implied by the terms hereinafter set forth.

SECTION 1. TERM.

- 1.1 This Agreement shall be for an initial term of one (1) year, commencing on **April 1, 2004** (the "Commencement Date"), and ending on **March 31, 2005**.
- 1.2 Provided that the Concessionaire is not in default under Section 13 hereof, and at the City's sole discretion, commencing upon written notice from Concessionaire to the City, which notice shall be given no later than 90 days prior to the expiration of the initial term of the Agreement. The City may extend the term of this Agreement for an additional one (1) year period, commencing on **April 1, 2004**, and ending on **March 31, 2005**.

SECTION 2. CONCESSION AREA.

The City hereby grants to the Concessionaire the exclusive right, during the term of this Agreement, to operate a concession for an open air street market, as described herein, in the following area(s) (hereinafter referred to collectively as the "Concession Area"), as more specifically delineated in Exhibit 2.0 herein:

- 2.1 Lenox Avenue to Drexel Avenue.
This Concession Area is limited to the public right-of-way bounded on the south by the southernmost line of the Lincoln Road right-of-way; bounded on the north by the northernmost line of the Lincoln Road right-of-way; bounded on the west by the easternmost edge of the sidewalk adjacent to and on the east side of Lenox Avenue; and bounded on the east the westernmost edge of the sidewalk adjacent to and on the west side of Drexel Avenue. The Concession Area does not include those portions of the public right-of-way where fountains, seating, or other public amenities or other uses authorized/licensed/permitted by the City are currently located or may be located in the future.
- 2.2 Notwithstanding the use of the Concession Area granted to Concessionaire above, Concessionaire herein understands, agrees, and acknowledges that the Concession Area, along with any and all other public right-of-way area(s) not specifically identified herein, are public and, as such, must remain available for the use and enjoyment of the general public whether or not the public chooses to purchase any of Concessionaire's goods, or otherwise partake of any of the services it provides. In the event that a member of the public is within a particular area of the Concession Area, Concessionaire agrees to allow for his/her continued peaceful enjoyment of said area.

SECTION 3. USE(S).

The Concessionaire is hereby authorized to conduct the following kind(s) of business(es) within the Concession Area, as provided below, all at its sole cost and expense:

- 3.1 Concessionaire shall operate and manage an open air street market, commonly known and referred to herein as the "Lincoln Road Green Market" (the Market), which shall provide a venue for vendors to sell and/or provide the following (as each is more specifically defined in Section 3.2):

- a) Plants and Cut Flowers; and
- b) Fruits, vegetables, and other edible products and related food items.

This shall also generally include the rental of booths, tents, tables, signs or space(s) (collectively the "facilities"), in conformance with the attached site plan (Exhibit 2.0). The City herein approves the rental of the aforestated facilities, and the prices for same, all as set forth in Exhibit 3.1, and as provided in Section 18. Any amendments to Exhibit 3.1 must be approved in writing by the City Manager or his designee and, prior to implementation of same, a new Exhibit 3.1 shall be incorporated herein.

3.1.1

Facilities Design:

The design, type, material, and color of any and all facilities, as defined above, shall be approved in writing by the City's Planning Department prior to the Commencement Date of this Agreement. A photo or photo(s) of City-approved facilities is incorporated herein as Exhibit 3.1.1. Thereafter, Concessionaire shall not change, alter, or modify said City-approved design, type, material and color of any facilities without the prior written consent of the City Manager or his designee, and, if so approved, an updated Exhibit 3.1.1 will be made a part of and incorporated into this Agreement.

3.1.2

Placement of Facilities:

All respective facilities within the Concession Area shall be placed substantially in accordance with the attached site plans, herein approved by the City and attached hereto and incorporated as Exhibit 2.0 herein. Concessionaire shall not deviate from or alter the approved site plans without the prior written consent of the City Manager or his designee.

3.1.2.1

Compliance with American with Disabilities Act (ADA) and any other applicable accessibility standards:

Concessionaire agrees and acknowledges that during all periods when its Market is in operation, including set-up and break-down periods, it shall comply with ADA standards, Florida Accessibility Code standards, and any other applicable accessibility standards required by law, including the provisions of the City's "Special Events Disability Access Punch List", attached hereto and incorporated as Exhibit 3.1.2.1 herein. Concessionaire's compliance with the provisions set forth in the attached Exhibit 3.1.2.1, includes, but shall not be limited to, any and all responsibilities associated with "Event Producer" as described therein.

3.1.2.2

The Concessionaire's responsibility to comply with the aforementioned provisions in Subsection 3.1.2.1 include, but are not limited to, ensuring that there is an accessible

path of travel from the handicap designated parking spaces and public transportation stops within the boundary of, areas associated with, and entrances to, Lincoln Road. Concessionaire shall:

- a) maintain accessible path(s) of travel that permit the unobstructed access to the entryways of all buildings, facilities, elements and spaces along Lincoln Road,
- b) maintain an unobstructed accessible path of travel on both the north sidewalk and the south sidewalk of Lincoln Road, and
- c) maintain an unobstructed accessible path(s) of travel from the north walkway to the south walkway of Lincoln Road.

3.1.2.3 Notwithstanding the above, Concessionaire's responsibility to comply with the requirements of this Section 3.1.2.1 and Section 3.1.2.2 shall be limited to those areas within the Concession Area as provided in Section 2.0 herein.

3.1.3

Set Up:

The set up of facilities to be placed within the Concession Area, substantially in accordance with the site plan(s) approved pursuant to Exhibit 2.0, shall be in accordance with the days and hours of operation in Section 9. Placement of vendor facilities shall be in accordance with and shall not exceed the maximum numbers, set forth in Exhibit 2.0, attached hereto and incorporated herein.

3.1.4

Public Right-of-Way:

The City and Concessionaire agree and acknowledge that the public's use of the public right-of way is a prime consideration and must be balanced accordingly with Concessionaire's proposed operations, as set forth herein. Accordingly, notwithstanding the site plans and maximum numbers (as provided for in the Set Up period) set forth in Subsection 3.1.3, Concessionaire further agrees that, notwithstanding its right to set up its maximum numbers, it will not alter or modify its site plans without the prior written consent of the City Manager or his designee.

Notwithstanding the preceding paragraph, City and Concessionaire may, from time to time, meet to review and, subject to City's prior written consent, revise the maximum numbers (as provided for in the Set-Up period) set forth in Subsection 3.1.3.

3.1.5 Interaction and Coordination with Other Lincoln Road Operations and Events:

Concessionaire agrees and understands that there are other businesses, establishments, operations and events which are ongoing, or may occur from time to time within or in close proximity to, the Concession Area. As such, Concessionaire agrees that it will use its best efforts to cooperate and coordinate with said businesses, establishments, operations and events so as to minimize the impact to the respective parties.

3.1.6 Conflict Resolution:

Concessionaire recognizes and understands that conflicts with one or more of the following entities, groups, and/or individuals may arise during the term of this Agreement, or any extensions thereof:

- Conflicts between Lincoln Road (or other) Merchants/Businesses and Concessionaire
- Conflicts between Vendors and Concessionaire
- Conflicts between Vendors and the General Public
- Conflicts between General Public and Concessionaire

As such, Concessionaire further recognizes and understands that notice of said conflicts may be directed to the attention of Concessionaire or the City. In the event a notice of conflict is communicated to the City, the City will communicate same to the Concessionaire, as soon as practicable.

Whenever a conflict arises, upon Concessionaire's receipt of notice of same, whether written or verbal, between any of the aforesated entities, groups, or individuals, with any of Concessionaire's operations, resolution to said conflicts will be addressed in the following manner:

1. Concessionaire shall meet with the conflicted party and endeavor, using its best efforts and good faith, to resolve the conflict to the satisfaction of all parties concerned within fourteen (14) calendar days from receipt of notice.
2. In the event the conflict cannot be resolved as stated in Number 1 above, then the Concessionaire shall provide written notice to the conflicted party, (with copy to the City Manager's designee) with a date on which to meet with the City Manager's designee, to address the conflict. At that time, the City Manager's designee will recommend a resolution. The City Manager's designee shall endeavor to set a meeting date within fourteen (14) calendar days of receipt of a copy of the written notice to the conflicted party. For purposes of this Section, the City Manager's designee shall be the Asset Manager of the City.

3. In the event the resolution recommended by the City Manager's designee is not acceptable to the Concessionaire or the conflicted party, the City Manager's designee shall inform the City Manager, and provide him with the pertinent details of the conflict. The City Manager may make a determination as to whether he concurs with the designee's recommendation; offer an alternate resolution; or choose to meet with Concessionaire and the conflicted party to get additional information prior to making a final determination.

Notwithstanding the foregoing, the City Manager's final determination, will be binding upon Concessionaire, and Concessionaire shall agree to be bound by same.

Concessionaire agrees and understands that the above referenced conflict resolution language is not applicable to any conflicts that may arise between the City and the Concessionaire pursuant to this Agreement, or conflicts outside of the City's purview, control or jurisdiction.

- 3.1.7 The condition and quality of Concessionaire's facilities shall at all times be maintained in a manner that is consistent with the condition and quality of similar facilities in first class open air markets located in other world class areas. It is the City's intent, and Concessionaire hereby agrees and acknowledges same, to develop and promote world class open air street market facilities and operations that would be comparable to those found in other world class public areas. Accordingly, Concessionaire shall not only, at a minimum, ensure that all facilities placed within the Concession Area are well maintained and in usable condition, but shall adhere, as indicated in this Subsection, to high ongoing maintenance standards for same consistent with the aforementioned condition and quality.
- 3.1.8 Quality of goods and services offered will be first-rate and comparable to that available in open air markets in other world class areas on par with the City of Miami Beach or, at a minimum, to the quality and pricing of goods and services provided by privately owned businesses selling like goods and services within the City of Miami Beach.
- 3.1.9 In addition to Concessionaire's general maintenance obligations for the Concession Area, as set forth in Section 10 hereof, all portions of the Concession Area, and the immediately surrounding 25-foot adjacent areas, shall at all times be maintained in a clean and sanitary manner.
- 3.1.10 The concession operations shall be offered to patrons at all times during the days and hours of operation set forth in Section 9 herein. However, if the City, at its sole discretion, deems that there is a decrease in demand for the concession operations, or if the

Concessionaire provides the City with written notice that it is desirous of reducing its hours of operation, (i) the City shall provide Concessionaire with a minimum of two (2) weeks prior written notice, requesting the specific decrease in Concessionaire's operation, or (ii) Concessionaire shall provide the City with, at minimum, two weeks prior written notice, requesting to reduce said hours, for the City's written approval (which shall not be unreasonably withheld) prior to implementing said schedule of reduced hours of operation. Said notice to the City shall include the newly proposed schedule of operation.

Similarly, if Concessionaire is desirous of increasing its hours of operation in the Concession Area then, in that event, the Concessionaire shall obtain the City's prior written consent.

Concessionaire agrees and acknowledges that any Concessionaire requested reduction in the scheduled hours of operation as may be provided herein shall not in any way reduce Concessionaire's financial responsibility to the City, as required in Section 4, except if same is deemed by the City to be a partial termination pursuant to Subsection 13.6.3.

3.2 Permitted Concession Operations / Uses.

3.2.1 Cut Flowers and Plants:

This shall generally include the sale of flowers, either individually or in bunches that have been cut from their base, and potted plants.

3.2.2 Fruits, Vegetables, Other Edible Products:

This shall generally include the sale of those edible items defined as, and generally including, fresh fruits, dried fruits, vegetables, nuts, preserves, pickled items, jams, jellies, juices, smoothies, and other non-alcoholic beverages.

3.2.3 In the event that the City Manager or his designee determines, at his sole option and discretion, that all or a portion of Concessionaire's proposed uses, pursuant to Subsection 3.1 and as defined in Section 3.2, are no longer desired, then the City may revoke Concessionaire's right to provide all or a portion of said uses, without cause, upon thirty (30) days written notice to Concessionaire. Any percentage of gross paid by Concessionaire (pursuant to Subsections 4.2 and 4.3) to City with regard to a delete/discontinued use, shall be prorated and/or adjusted accordingly as of the date of termination of said use, and no further payment shall be required for same during the term of this Agreement, unless the City reinstates the use, at which time the payment provisions of Subsections 4.2 and 4.3 shall once again apply.

3.3 Intentionally Omitted.

3.4 Intentionally Omitted.

3.5 Intentionally Omitted.

3.6 Off-Duty Police / Field Monitor.

3.6.1 Off-Duty Police:

Off-duty Police services are not contemplated as of the execution date of this Agreement. However, in the event the City deems, in its reasonable discretion, that Off-duty Police officer services are required, as same may be warranted by changes in Market conditions or operations, the parties herein agree to meet and discuss said proposed changes.

3.6.2 Field Monitor:

Additionally, Concessionaire agrees and understands that a Field Monitor, who will report to and be under the direction of the City, is required for a minimum of two (2) hours daily on Sunday mornings in order to assist and facilitate during set-up times. Concessionaire further agrees and understands that any and all costs associated with said Field Monitor shall be borne by Concessionaire and reimbursed to the City on a monthly basis, along with its regularly scheduled monthly payments pursuant to Section 4.2 herein. Concessionaire's responsibility for the costs associated with said Field Monitor position for the initial term shall be limited to Seventeen (\$17.00) Dollars per hour. During the renewal term, said limit shall be increased by 3% per contract year or by the annual Consumer Price Index, All Urban Consumers, as reported by the U.S. Bureau of Labor Statistics (CPI), whichever is greater.

3.6.3 Concessionaire supervisory/management employee shall be on duty and on-site within the Concession Area, or available via telephone, at all times during which the Market is operating, including but not limited to Set-Up and Move-Out periods, as defined in Subsection 9.2 herein.

3.7 Vendor Selection / First Priority to Miami Beach Merchants.

3.7.1 Within thirty (30) days from the Commencement Date of this Concession Agreement, and for a period of thirty (30) days thereafter, the Concessionaire shall offer Miami Beach licensed merchants the opportunity to participate (a booth space in the Market) as vendors before opening its search to the general public or other networks. The Concessionaire will establish this "pool" and will also serve as the clearinghouse for booth availability and vendor applicants. The Concessionaire shall commit to use this clearinghouse during the initial availability of booth space before expanding its search to other networks.

The Concessionaire will use best efforts to ensure that all Miami

Beach licensed merchants are contacted and that announcements regarding booth availability are disseminated throughout the City of Miami Beach, as quickly as possible so as to take optimum advantage of the thirty (30) day availability period, including but not limited to, advertising in a local newspaper, placing information on the Market or other websites, or other similar efforts.

The Concessionaire will make itself available to answer any questions potential applicants may have about the Market.

3.7.2 Notwithstanding the foregoing, and for purposes of this Section 3.7, in the event that the number of responsive Miami Beach licensed merchants desirous of participating in the Market would cause Concessionaire to displace any vendors who have been and are currently and actively participating in the Market as of the date of execution of this Agreement, and such displacement is directly due to lack of available space within the Concession Area, then in such event Concessionaire and the City agree to meet and discuss, in good faith, and make reasonable efforts to resolve this matter. It is understood by the parties herein, that the intent of this Subsection 3.7 is not to displace vendors who are currently and actively participating in the Market but to provide opportunities for those Miami Beach licensed merchants who desire to participate in the Market.

3.7.3 The Concessionaire will keep and make available to the City for inspection, upon notice by the City, carefully detailed records, including the name, address, telephone numbers, qualifications, experience, and the proposed goods and services to be offered for sale by its vendors, and will pay particular attention to matching vendors and booths with appropriate locations.

3.8 Removal of Concession Facilities.

Concessionaire agrees that all its facilities or other items used in the concession operations will be removed from the public right-of-way/Concession Area and said removal shall be done on a daily basis, in compliance with the time parameter(s) set forth in Subsection 9.2 herein.

3.9 Hurricane Evacuation Plan.

Concessionaire agrees that all its facilities or other items used in the concession operations will be removed from the public right-of-way/Concession Area and said removal shall immediately begin no later than upon the issuance of a Hurricane Warning by the Miami-Dade County Office of Emergency Management, and stored at a private, off-site location.

3.10 City Occupational Licenses.

Concessionaire shall obtain, at its sole cost and expense, any occupational licenses required by City law, as amended from time to time, for its proposed operations, as contemplated in Section 3 of this Agreement. For purposes of

this Agreement, Concessionaire shall obtain the applicable "Promoters" category City occupational license.

SECTION 4. CONCESSION FEES.

4.1 Security Deposit.

Upon execution of this Agreement Concessionaire shall furnish the City with a Security Deposit, in the amount of **One Thousand (\$1,000) Dollars** (approximately equal to one month's rent based on the Market's prior year's actual revenues). Said Security Deposit shall serve to secure Concessionaire's performance in accordance with the provisions of this Agreement. In the event the Concessionaire fails to perform in accordance with said provisions, the City may retain said Security Deposit, as well as pursue any and all other legal remedies provided herein, or as may be provided by applicable law.

The parties agree and acknowledge that the foregoing condition is intended to be a condition subsequent to the City's approval of this Agreement. Accordingly, in the event that Concessionaire does not satisfy the aforesaid condition within the time periods provided herein, then the City Manager or his designee may immediately, without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to him for breach of contract.

4.2 Percentage of Gross (vs.) MG (PG).

During the initial term, and any renewal term, of the Agreement, Concessionaire shall pay the City, on a monthly basis, and within thirty (30) calendar days from the end of each month during the term herein, an amount equal to fifteen (15%) percent of Concessionaire's gross receipts (PG). In the event that the annual PG is less than the amount provided in Subsection 4.3 below, then the Concessionaire shall also pay to the City, on an annual basis, the difference between the PG amount and the amount provided in Subsection 4.3 below, no later than 30 days after the expiration of the initial term, or of the renewal term of this Agreement, as the case may be.

Notwithstanding the above, in the event Concessionaire's annual gross receipts exceed 110% of its prior year gross receipts, Concessionaire shall pay to the City an additional amount equal to 2.5% of those gross receipts that exceed 100%, through and including those gross receipts that equal 120% of its prior year's gross receipts; and

In the event Concessionaire's annual gross receipts exceed 120% of its prior year gross receipts, Concessionaire shall also pay to the City an additional amount equal to 5% of those gross receipts that exceed 120% of its prior year's gross receipts.

The term "gross receipts" is understood to mean all income, whether collected or accrued, derived by the Concessionaire under the privileges granted by this Agreement, excluding amounts of any Federal, State, or City

sales tax, or other tax, governmental imposition, assessment, charge or expense of any kind, collected by the Concessionaire from customers and required by law to be remitted to the taxing or other governmental authority. Except as otherwise provided, with regard to a special event under Subsection 16.1 hereof in which Concessionaire is not permitted to continue operating, the pro-rata share due to the City for the event days will be abated.

4.3 Minimum Guarantee (MG).

Notwithstanding the PG payment required pursuant to Subsection 4.2, and in consideration of the City executing this Agreement and granting the rights provided in this Agreement, Concessionaire shall pay to the City a Minimum Guaranteed Annual Concession Fee (MG) of **Eight Thousand Four Hundred (\$8,400) Dollars** for the initial term. Said initial MG is based on a percentage (approximately 75%) of the Calendar Year 2003 revenues received by the City of Miami Beach, from The Market Company, Inc., pursuant to the Market Company's Special Event permit for the Lincoln Road Green Market for the respective time period, and shall be paid annually in accordance with Sections 4.2 and 4.3, as applicable.

In the event that the City, at its sole discretion, chooses to extend the term of this Agreement for the additional one (1) year renewal term, the renewal term year MG shall be automatically increased, by five percent (5%) from the previous year's MG, or seventy five (75%) percent of the prior year revenues remitted to the City, whichever is greater, and shall be due and payable to the City, in accordance with Sections 4.2 and 4.3, as applicable.

4.4 Cost for Use of Electricity.

Concessionaire shall also remit to the City, along with its monthly payments required under Section 4.2, an amount equal to two dollars (\$2.00) per Market day, plus applicable sales and use tax, for each vendor location that proposes to use electricity.

4.5 Interest for Late Payment.

Any payment which Concessionaire is required to make to City which is not paid on or before the respective date provided for in this Agreement shall be subject to interest at the rate of twelve percent (12%) per annum, from the due date of payment until such time as payment is actually received by the City.

4.6 Sales and Use Tax.

It is also understood that, if applicable, the required Florida State Sales and Use Tax shall be added to Concessionaire's payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax.

SECTION 5. MAINTENANCE AND EXAMINATION OF RECORDS.

Concessionaire shall maintain current, accurate, and complete financial records on an

accrual basis of accounting related to its operations pursuant to this Agreement. Systems and procedures used to maintain these records shall include a system of internal controls and all accounting records shall be maintained in accordance with generally accepted accounting principles and shall be open to inspection and audit, but not photocopying, by the City Manager or his designee upon reasonable prior request and during normal business hours. Such records and accounts shall include a breakdown of gross receipts, expenses, and profit and loss statements and such records shall be maintained as would be required by an independent CPA in order to audit a statement of annual gross receipts and profit and loss statement pursuant to generally accepted accounting principles.

A monthly report of gross receipts must be submitted to the City, through the Finance Department's Revenue Manager, to be received no later than thirty (30) days after the close of each month.

SECTION 6. INSPECTION AND AUDIT.

Concessionaire shall maintain its financial records pertaining to its operations for a period of three (3) years after the conclusion of the initial term, or (if approved) the renewal term, and such records shall be open and available to the City Manager or his designee, as deemed necessary by the City Manager or his designee. Concessionaire shall maintain all such records at its principal office, currently located at 428 Espanola Way, Miami Beach, Florida, 33139 or, if moved to another location, all such records shall be relocated, at Concessionaire's expense, to a location within the City of Miami Beach, within ten (10) days' written notice from the City that the City desires to review said records.

The City Manager or his designee shall be entitled to audit Concessionaire's records pertaining to its operation as often as it deems reasonably necessary throughout the term of this Agreement, and three (3) times within the three (3) year period following termination of the Agreement, regardless of whether such termination results from the natural expiration of the term or for any other reason. The City shall be responsible for paying all costs associated with such audits, unless the audit(s) reveals a deficiency of five percent (5%) or more in Concessionaire's statement of gross receipts for any year or years audited, in which case the firm shall pay to the City, within thirty (30) days of the audit being deemed final (as specified below), the cost of the audit and a sum equal to the amount of the deficiency revealed by the audit, plus interest; provided, however, the audit shall not be deemed final until Concessionaire has received the audit and has had a reasonable opportunity to review the audit and discuss the audit with the City. Nothing contained within this Section shall preclude the City's audit rights for resort tax collection purposes.

Concessionaire shall submit at the end of the initial term (and, if approved, the renewal term), an audited annual statement of gross receipts, in a form consistent with generally accepted accounting principles.

It is Concessionaire's intent to stay informed of comments and suggestions by the City regarding Concessionaire's performance under the Agreement. Within thirty (30) days after the end of the initial term (and, if approved, the renewal term), Concessionaire and City may meet to review Concessionaire's performance under the Agreement. At the meeting, Concessionaire and City may discuss quality, operational, maintenance and any other issues regarding Concessionaire's performance under the Agreement.

SECTION 7. TAXES, ASSESSMENTS, AND UTILITIES.

- 7.1 Concessionaire agrees to and shall pay before delinquency all taxes (including but not limited to resort taxes) and assessments of any kind assessed or levied upon Concessionaire by reason of this Agreement or by reason of the business or other activities and operations of Concessionaire upon or in connection with the Concession Area. Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings diligently conducted in good faith. Concessionaire may refrain from paying a tax or assessment to the extent it is contesting the assessment or imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax and/or assessment if so ordered.

Concessionaire shall also pay for any fees imposed by law for licenses or permits for any business, activities, or operations of Concessionaire upon the Concession Area.

Concessionaire shall pay before delinquency any and all charges for utilities used by, for, or on behalf of the operations contemplated herein (including, but not limited to, water, electricity, gas, heating, cooling, sewer, telephone, trash collection, etc.).

- 7.1.1 Electricity:
City acknowledges that Concessionaire may require electrical outlets to operate some vendor locations for registers, lighting fixtures, etc. Any usage of electricity from City-owned sources, shall be reimbursed to the City in accordance with the provisions outlined in Section 4.4 herein. Concessionaire agrees to remit to the City, on a monthly basis, along with the payment of rent, a list of all vendors which use electricity.

- 7.2 Procedure If Ad Valorem Taxes Assessed.
Notwithstanding Subsection 7.1 above, the parties agree that the concession operations contemplated herein are for public purposes and, therefore, no ad valorem taxes should be assessed by the Miami-Dade County Tax Appraiser. If, however, said taxes are assessed, City and Concessionaire shall use reasonable efforts to address payment of same.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

- 8.1 In connection with the performance of its responsibilities hereunder, Concessionaire may hire its own employees and/or independent contractors, who will be employees and/or independent contractors of Concessionaire and not employees or agents of the City. Additionally, Concessionaire's vendors shall not be considered agents or employees of the City. Concessionaire shall select the number, function, qualifications,

compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to its employees and/or independent contractors.

8.2 Concessionaire shall ensure that all its employees and/or independent contractors observe all the graces of personal grooming. The Concessionaire shall hire people to work in its concession operation who are neat, clean, well groomed and shall comport themselves in a professional and courteous manner, and ensure that its vendors and/or independent contractors comply with same. The Concessionaire and any persons hired by same, shall never have been convicted of a felony. If Concessionaire materially fails to comply with this provision the City may default Concessionaire pursuant to Section 13 herein.

8.3 The Concessionaire shall have an experienced manager or managers overseeing the concession operations at all times.

SECTION 9. SCHEDULE OF OPERATION.

Concessionaire's operations shall be open on the Concession Area, in accordance with the schedule outlined below, weather or events of force majeure permitting.

9.1 Day(s) of Operation: Sundays only

9.2 Operating Hours:

Set-Up:

Must not begin earlier than 6:00 AM and end by 10:00 AM

Market operating hours:

Daylight Savings Time: 9:00 AM to 7:00 PM

Eastern Standard Time: 9:00 AM to 6:00 PM

Move-Out:

Daylight Savings Time: 7:00 PM to 8:00 PM

Eastern Standard Time: 6:00 PM to 7:00 PM

Any change in the days or hours of operation require the prior written consent of the City Manager including, but not limited to, change in the days and hours of operation requested pursuant to Subsection 3.1.10.

SECTION 10. MAINTENANCE.

10.1 The Concessionaire accepts the use of the Concession Area provided in this Agreement in its "as is" condition. Concessionaire assumes sole responsibility and expense for maintenance of the Concession Area and its facilities therein. This shall include daily removal of litter, garbage and debris, said removal to be the sole responsibility and expense of Concessionaire. Daily maintenance shall be accomplished on all days and hours Concessionaire operates. Concessionaire agrees, also at its sole cost and

expense, to pay for all garbage disposal generated by its operations.

10.2 Garbage Receptacles.

With respect to litter, garbage and debris removal, the Concessionaire shall provide, at its sole cost and expense, receptacles within the confines of the Concession Area and shall provide a sufficient number of these receptacles for its own use and for the use of the public that patronizes the Market. Disposal of the contents of said receptacles and removal of litter, garbage and debris within the Concession Area, shall be accomplished by the end of the day on all days on which the Concessionaire operates, and shall be the sole responsibility of the Concessionaire. Any costs for removal of the contents of said trash receptacles by the City, because of the Concessionaire's failure to do the same, will be charged to, and become the responsibility of, the Concessionaire. The dumping or disposal of any refuse, discards, trash or garbage, generated by, or as a result of the concession operations, into any City trash receptacles by the Concessionaire (including its staff, employees and/or vendors) shall be strictly prohibited. Determination of the "number" of receptacles shall at all times be within the City's sole discretion, and Concessionaire shall agree to be bound by same.

10.3 Pressure Cleaning.

Concessionaire shall be responsible, at its sole cost and expense, for the pressure cleaning of the Concession Area, including all abutting sidewalks and public right-of-way adjacent thereto, at least once every three (3) months, or on an as needed basis, as deemed by the City, in its sole discretion.

10.4 Facilities.

Intentionally Omitted.

10.5 Orderly Operation.

The Concessionaire shall have a neat and orderly operation at all times and shall be solely responsible for the necessary housekeeping services to properly maintain the Concession Area and all facilities incident thereto. The Concessionaire shall make available all operations and facilities within the Concession Area (including but not limited to vendor facilities) for examination during days and hours of operation by the City Manager or his authorized representative.

10.6 No Dangerous Materials.

- 10.6.1 The Concessionaire agrees not to use or permit in the Concession Area and/or facilities the storage and/or use of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane, natural gas, or other similar substances, combustible materials, or explosives of any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida. Any such substances or materials found within the Concession Area and/or

facilities shall be immediately removed.

- 10.6.2 Notwithstanding any contrary provisions of this Agreement, Concessionaire, after the Commencement Date, shall indemnify and hold City harmless from any loss, damage, cost, or expense of the City, including, without limitation, reasonable attorney's fees, incurred as a result of, arising from, or connected with the placement by Concessionaire, and/or its employees, vendors, agents and/or subcontractors, after the Commencement Date, but during the term of this Agreement, of any hazardous substance or petroleum products on, under, in or upon the Concession Area as those terms are defined by applicable Federal and State Statute, or any environmental rules and environmental regulations promulgated thereunder; provided, however, Concessionaire shall have no liability in the event of the willful misconduct or gross negligence of the City, its agents, servants or employees. The provisions of this Subsection 10.6 shall survive the termination or earlier expiration of this Agreement.

10.7

Security.

The Concessionaire shall be responsible for and provide reasonable security measures which may be required to protect the Concession Area and any of the facilities, goods and/or other equipment thereon. Under no circumstances shall the City be responsible for any stolen or damaged goods, facilities, materials and/or other equipment, nor shall City be responsible for any stolen or damaged personal property of Concessionaire's employees, vendors, patrons, guests, invitees, and/or other third parties.

10.8

Vehicles on the Public Right-of-Way.

Concessionaire's employees, vendors, patrons, guests, invitees, and/or other third parties vehicles and/or trailers shall only be allowed on the street adjacent to Concession Area/public right-of-way for purposes of setting up the concession operations, and to remove same at the close of operations each day, and any and all such vehicles for purposes thereon must be removed from the public right-of-way immediately thereafter. Concessionaire shall contractually require that anyone operating a vehicle for, or on behalf of Concessionaire and/or its employees, agents, and/or vendors, must have a current valid Florida Driver's License. Said set-up and move-out operations shall only be permitted during regular hours for same, pursuant to Subsection 9.2 herein, and shall be completed safely and expeditiously. No vehicular traffic or parking will be permitted on the public right-of-way during concession hours of operation, pursuant to Subsection 9.2 herein. Access to the public right-of-way shall only be permitted via specifically designated points authorized for such use and the nearest authorized access to a concession vendor's operation.

Vehicles operated on the public right-of-way shall not exceed 5 M.P.H. and shall only operate in the immediate vicinity of the concession, or to-and-from the nearest predetermined and assigned access point. After transporting facilities, goods, merchandise, equipment, and/or other items to the

Concession Area, the vehicles shall be removed from the public right-of-way and parked in a legally authorized location. Driving on the public right-of-way shall be kept to a minimum. No vehicular traffic will be permitted on the public right-of-way, at any time or for any purpose, other than as stated herein.

Vehicle operator must inspect the vehicles perimeter and surrounding area, prior to turning the vehicles ignition switch, to assure a clear path of egress and only proceed with extreme caution.

10.9

Inspection.

The Concessionaire agrees that the Concession Area and all facilities and operations thereon, including but not limited to vendor booths, may be inspected at any time during days and hours of operation by the City Manager or his designee, or by any other Municipal, County, State officer, or agency having responsibilities for inspections of such operations. The Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference (which interference, if by the City, must be reasonable) with the concession operation by any public agency or official in enforcing their duties or any laws or ordinances. Any such interference (which interference, if by the City, must be reasonable) shall not relieve the Concessionaire from any obligation hereunder.

SECTION 11. INSURANCE.

Concessionaire shall maintain, at its sole cost and expense, the following types of insurance coverage at all times throughout the term of this Agreement.

- a. Comprehensive General Liability in the minimum amount of One Million Dollars (\$1,000,000) per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability.
- b. Workers Compensation Insurance shall be provided as required under the Laws of the State of Florida.
- c. Automobile Insurance for any vehicles used for, or associated with concessionaire's operations shall be provided covering all owned, leased, and hired vehicles and non-ownership liability for not less than the following limits:

Bodily Injury	\$1,000,000 per person
Bodily Injury	\$1,000,000 per accident
Property Damage	\$1,000,000 per accident

Failure to procure or maintain the required insurance program shall, at the City's discretion, either (i) constitute an automatic default of the Concession Agreement under which the City may, upon written notice to Concessionaire, immediately terminate the Agreement; or (ii) the City, in its sole discretion, may obtain the insurance itself, in which case said insurance shall be charged

back to the Concessionaire as provided in the following paragraph.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days prior written notice to the City, and then only subject to the prior written approval of the City Manager or his designee. Prior to the Commencement Date of this Agreement, Concessionaire shall provide City with a Certificate of Insurance for each such policy. ALL POLICIES SHALL NAME THE CITY OF MIAMI BEACH FLORIDA AS AN ADDITIONAL NAMED INSURED. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should Concessionaire fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, automatically terminate this Agreement or, in the alternative, deem to obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by Concessionaire to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Concessionaire fails to repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, or, at its option, the City may declare the Agreement in default pursuant to Section 13 herein.

SECTION 12. INDEMNITY.

- 12.1 In consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatsoever kind or nature arising out of error, omission, or negligent act of Concessionaire, and/or its vendors, agents, servants, employees and/or subcontractors and/or subconcessionaires in the performance of services under this Agreement.
- 12.2 In addition, in consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its agents, servants or employees, from and against any claim, demand or cause of action of whatever kind or nature arising out of any misconduct of Concessionaire, and/or its vendors, agents, servants, employees and/or subcontractors and/or subconcessionaires, not included in the paragraph in the Subsection above and for which the City, its agents, servants or employees are alleged to be liable.
- 12.3 Subsections 12.1 and 12.2 shall survive the termination or expiration of this Agreement. Subsections 12.1 and 12.2 shall not apply, however, to any such liability, that arises as a result of the willful misconduct or gross negligence of the City, its agents, servants or employees.

12.4 Subrogation.

The terms of insurance policies referred to in Section 11 shall preclude subrogation claims against Concessionaire, the City and their respective officers, employees and agents.

12.5 Force Majeure.

Neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by:

- a. fire which renders at least thirty percent (30%) of the Concessionaire's cumulative facilities and operations unusable and which is not caused by negligence of Concessionaire;
- b. earthquake; hurricane; flood; act of God; civil commotion occurring on the Concession Area during or in connection with any event or other matter or condition of like nature; or
- c. any law, ordinance, rule, regulation or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, or war.

12.6 Labor Dispute.

In the event of a labor dispute which results in a strike, picket or boycott affecting the Concession Area or operation described in this Agreement, Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining agreements and there has been a final determination of such fact which is not cured by Concessionaire within thirty (30) days.

12.7 Waiver of Loss from Hazards.

The Concessionaire hereby expressly waives all claims against the City for loss or damage sustained by the Concessionaire resulting from fire, water, natural disasters/acts of God (e.g. hurricane, tornado, etc.), civil commotion, riot, or any other Force Majeure contemplated in Subsection 12.5 and Labor Dispute in Subsection 12.6 above, and the Concessionaire hereby expressly waives all rights, claims, and demands against the City and forever releases and discharges the City of Miami Beach, Florida, from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 13. DEFAULT AND TERMINATION.

Subsections 13.1 through 13.3 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle City to exercise any and all remedies described as City's remedies under this Agreement, including but not limited to those set forth in Subsection 13.4. An event of default by City shall entitle Concessionaire to exercise any and all remedies described as Concessionaire's remedies under this Agreement, including but not limited to those set forth in Subsection 13.5.

13.1

Bankruptcy.

If either the City or Concessionaire shall be adjudged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and shall not be discharged within sixty (60) days after appointment, or if either party shall make an assignment of its property for the benefit of creditors, or shall file a voluntary petition in bankruptcy, or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or if such petitions shall be filed against either party and shall not be dismissed within sixty (60) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.2

Default in Payment.

In the event Concessionaire fails to submit any payment within five (5) days of its due date, there shall be a late charge of \$50.00 per day for such late payment, in addition to interest at the highest rate allowable by law (currently 12% per annum). If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Concession Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.3

Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement, and such failure continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract. In the event that a default is not reasonably susceptible to being cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof. In the event Concessionaire cures any default pursuant to this Subsection, it shall promptly provide City with written notice of same.

13.4

City's Remedies for Concessionaire's Default.

If any of the events of default, as set forth in this Section 13, shall occur, the City may, after notice (if required) and the expiration of cure periods (as provided above), at its sole option and discretion, institute such proceedings as in its opinion are necessary to cure such defaults and to compensate City for damages resulting from such defaults, including but not limited to the right

to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the term of this Agreement shall terminate upon the date specified in such notice from City to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.7. Upon the termination of this Agreement, all rights and interest of Concessionaire in and to the Concession Area and to this Agreement, and every part thereof, shall cease and terminate and City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement. In addition to the rights set forth above, City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under Florida law against Concessionaire; and or
- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages resulting from Concessionaire's default.

13.5 If an event of default by the City, as set forth in this Section 13, shall occur, the Concessionaire may, after notice (if required) and the expiration of the cure periods (as provided above), at its sole option and discretion, terminate this Agreement upon written notice to the City and/or sue for damages. Said termination shall become effective upon receipt of a written notice of termination by the City, but in no event shall Concessionaire specify a termination date that is less than sixty (60) days from the date of the written termination notice. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.7.

13.6 Termination for Convenience/Partial Termination.

13.6.1 Notwithstanding the provisions of this Section 13, this Agreement may be terminated by the City, for convenience and without cause, upon the furnishing of thirty (30) days prior written notice to Concessionaire.

Conversely, this Agreement may be terminated by the Concessionaire, for convenience and without cause, upon the furnishing of thirty (30) days prior written notice to City.

13.6.2 Concessionaire acknowledges that the City may develop a schedule of capital improvements for the right-of-way, including all or a portion of the Concession Area, which may entail a closure of all or a portion of the right-of-way and Concession Area, at the City Commission's sole discretion. In the event that the City closes down the right-of-way, or any other portion of the Concession Area, for the purpose of undertaking a capital improvement plan thereon, then the parties agree that that portion of the Agreement referencing said individual Concession Area shall be partially terminated for convenience,

without cause and without penalty to either party, and only as to that portion of the Concession Area which has been closed. Such a termination shall become effective upon thirty (30) days prior written notice to Concessionaire.

13.6.3 In the event of termination or partial termination by City of the Agreement pursuant to this Subsection, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants and employees (including, but not limited to, claims for interference in business or damages for interruption of services or interference in its concession operations by Concessionaire or its vendors). However, if it is determined, via a contract year end-review, that a partial termination results in a substantial decrease to the estimated gross revenues derived by the Concessionaire, then Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the percentage of Concession Area that was partially terminated and for the period of time of said partial termination.

13.6.4 In the event of termination for convenience by Concessionaire pursuant to Subsection 13.6.1, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants and employees. Moreover, Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the period of time of remaining on the currently remaining term of this Agreement.

13.7 Surrender of Concession Area.

At the expiration of this Agreement, or in the event of a partial termination or termination of the entire Agreement, Concessionaire shall surrender the Concession Area (or portion thereof in the event of a partial termination) in the same condition as the Concession Area was prior to the commencement of this Agreement, reasonable wear and tear excepted. Concessionaire shall remove all its facilities, equipment, fixtures, personal property, etc. upon two (2) hours written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Concession Area (or portion thereof) after termination (or partial termination) of the Agreement shall constitute trespass by the Concessionaire, and may be prosecuted as such. In addition, the Concessionaire shall pay to the City one thousand dollars (\$1,000) per day as liquidated damages for such trespass and holding over.

SECTION 14. PERFORMANCE BOND OR ALTERNATE SECURITY.

Intentionally Omitted.

SECTION 15. ASSIGNMENT.

Except as otherwise provided in this Subsection, or in the Agreement, Concessionaire shall not assign, sublease, grant any concession or license, permit the use of by any other person other than Concessionaire, or otherwise transfer all or any portion of this Agreement and/or of the Concession Area (all of the forgoing are herein after referred to collectively as "transfers"), without the prior written consent of the City.

Concessionaire shall notify the City Manager or his designee of any proposed transfer, prior to consummation of same and the City or the City Manager or his designee, as applicable, shall respond within thirty (30) days. In the event that any such transfer is approved, the transferee shall agree to be bound by all the covenants of this Agreement required of the transferor hereunder. Any transfer made without complying with this Section shall be null, void, and of no effect and shall constitute an act of default under this Agreement. Notwithstanding any such consent, or any permitted transfer under any provision of this Section, unless expressly released by the City, Concessionaire shall remain jointly and severally liable (along with each approved transferee, who shall automatically become liable for all obligations of the transferor hereunder with respect to that portion of the Agreement so transferred), and the City shall be permitted to enforce the provisions of this Agreement directly against Concessionaire or any transferee of the Concessionaire without proceeding in any way against any other person.

For purposes of this Section 15, Concessionaire's selection of vendors for the Market shall not be deemed a transfer.

SECTION 16. SPECIAL EVENTS.

- 16.1 Concessionaire's proposed uses, as set forth in Section 3 herein, do not contemplate the production, promotion or sponsorship by the Concessionaire of special events in any portion of the Concession Area. In the event Concessionaire does produce, promote or sponsor a special event in the Concession Area, it shall abide by the City's Special Events Permit Requirements and Guidelines. For any use, other than those provided for in this Agreement, a Special Events Permit may be required and shall be obtained through the City's Department of Tourism and Cultural Development. The City Manager's authorization must be obtained for any such special event.

The City Administration shall evaluate requests for Special Events Permits on a case by case basis, in accordance with the City's Special Event Permit Requirements and Guidelines.

In the event that a special event and/or film permit is requested by an entity, other than the Concessionaire, and the proposed special event and/or film production is scheduled to occur within all or a portion of the Concession Area, the Concessionaire agrees to cooperate with the City and the special event permit applicant to allow use of the Concession Area during the period of the special event, including set-up and break-down time.

16.2

City Special Events.

Notwithstanding Subsection 16.1 above, and in the event that the City, at its sole discretion, deems that it would be in the best interest of the City, the City reserves the right to displace the Concessionaire for City produced special events and/or other City produced productions. In such cases, the City may request that the Concessionaire cease and desist operations during the term of, and in the area of, the special event and/or production, and the Concessionaire shall cease and desist during said term. In the event that it is determined, via a contract year end-review, that ceasing and desisting of concession operations, as stated herein, results in a decrease to the estimated gross revenues derived by the Concessionaire, then Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the percentage of reduced hours of operation caused by said special event and/or production. If the Concessionaire is not required to close, or chooses to remain open without interference to the special event and/or production, Concessionaire agrees to cooperate with the City. If the Concessionaire is allowed to remain open during special events and/or productions, the Concessionaire may be allowed to have in operation its normal daily complement of facilities and vendors. "Normal" shall be defined as facilities and vendors, as approved by the City, that the Concessionaire has available for the public on a normal business day. Such facilities and vendors shall not be increased or altered during special events and/or productions without the prior written permission of the City Manager or his designee. To the extent that the normal business day complement of facilities and vendors is displaced by the special event and/or production, the Concessionaire may reallocate such displaced facilities and vendors on a pro-rata basis within an area of the Concession Area not being utilized by the special event and/or production.

For purposes of this Section 16, "normal business day" shall be defined as set forth in Section 9 herein, entitled "Schedule of Operations".

16.3

Notwithstanding anything to the contrary, if a special event occurs in all or any portion of any Concession Area, Concessionaire shall not be liable for any charge, fee or other expense, governmental or otherwise, in connection with such special event.

16.4

Street Vendors / Street Performers.

Any locations within the Concession Area identified by the City for non-Concessionaire sponsored street vendors and/or street performers, in accordance with City of Miami Beach Ordinance No. 2002-3366, as may be amended from time to time, or otherwise in accordance with the City's respective rules, regulations, and guidelines associated therewith, as same may also be amended from time to time, are excluded from this Agreement, and Concessionaire shall not interfere or otherwise prohibit said street vendors and/or street performers' activities upon such designated portions of the public right-of-way. Similarly, Concessionaire shall not prohibit or otherwise interfere with the activities of any street vendors and/or street performers who may not be part of a City of Miami Beach permitted process,

but who may have certain constitutionally protected rights to perform and/or offer for sale their wares on public rights-of-way.

SECTION 17. NO IMPROPER USE.

The Concessionaire will not use, nor suffer or permit any person to use in any manner whatsoever, the Concession Area, operations, or facilities for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or Municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. The Concessionaire will protect, indemnify, and forever save and keep harmless the City, its agents, employees and contractors from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any act, neglect or omission of the Concessionaire, its vendors, employees, agents, and/or subcontractors regarding the Concession. In the event of any violation by the Concessionaire, or if the City or its authorized representative shall deem any conduct on the part of the Concessionaire, its vendors, agents, employees and/or subcontractors, to be objectionable or improper, the City shall have the option, at its sole discretion, to either (i) automatically terminate the Agreement, upon prior written notice to Concessionaire, or to (ii) suspend the concession operations should the Concessionaire fail to correct any such violation, conduct, or practice to the satisfaction of the City within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice, and such suspension shall continue until the violation is cured. The Concessionaire further agrees not to commence operations during the suspension until the violation has been corrected to the satisfaction of the City.

SECTION 18. PRICE SCHEDULES.

Intentionally Omitted.

SECTION 19. NOTICES.

All notices from the City to the Concessionaire shall be deemed duly served upon receipt, if mailed by registered or certified mail with a return receipt to the Concessionaire at the following address:

Ms. Claire Tomlin
The Market Company
428 Espanola Way
Miami Beach, Florida 33133

All notices from the Concessionaire to the City shall be deemed duly served upon receipt, if mailed by registered or certified mail, return receipt requested, to the City of Miami Beach at the following addresses:

City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

The Concessionaire and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Concession Agreement must be in writing.

SECTION 20. LAWS.

20.1 Compliance.

Concessionaire shall comply with all applicable City, Miami-Dade County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations.

20.2 Governing Law.

This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Florida. In case of any inconsistency between the terms of this Agreement, and any applicable general or special law, said general or special law shall govern, unless otherwise provided herein.

20.3 Equal Employment Opportunity.

Neither Concessionaire nor any affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, sexual orientation, and disability, as defined in Title I of ADA. Concessionaire will take affirmative steps to utilize minorities and females in the work force and in correlative business enterprises.

20.4 No Discrimination.

The Concessionaire agrees that there shall be no discrimination as to race, sex, sexual orientation, color, creed, national origin, familial status, religion or handicap, in its employment practice or in the operations referred to by this Concession Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation within the Concession Area. All concession operations and services offered shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the operations and the facilities.

- 20.4.1 Pursuant to Sections 62-90 and 62-91, of Chapter 62, of the Miami Beach City Code entitled "Human Relations", Concessionaire, by executing this Agreement, certifies that it does not discriminate in its membership or policies based on race, color, national origin, religion, sex, sexual orientation, familial status or handicap.

SECTION 21. MISCELLANEOUS.

21.1 No Partnership.

Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the City and Concessionaire.

- 21.2 Modifications.
This Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved by the Mayor and City Commission except where such authority has been expressly provided herein to the City Manager or his designee.
- 21.3 Complete Agreement.
This Agreement, together with all exhibits incorporated hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to Concessionaire's operations, as contemplated herein.
- 21.4 Headings.
The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.
- 21.5 Binding Effect.
This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.
- 21.6 Clauses.
The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.
- 21.7 Severability.
If any provision of this Agreement or any portion of such provision or the application thereof to any person or circumstance shall be held to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement as so modified shall.
- 21.8 Right of Entry.
The City, at the direction of the City Manager, shall at all times during days and hours of operation, have the right to enter into and upon any and all parts of the Concession Area for the purposes of examining the same for any reason relating to the obligations of parties to this Agreement.
- 21.9 Not a Lease.
It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the Concessionaire, that it is a

concessionaire and not a lessee; that the Concessionaire's right to operate the concession shall continue only so long as this Agreement remains in effect.

21.10

Signage.

Concessionaire shall provide, at its sole cost and expense, any required signs at its concessions. All advertising, signage and postings shall be approved, in writing, by the City in its proprietary capacity, and shall be in accordance with all applicable Municipal, County, State and Federal laws and regulations. Any signage posted by Concessionaire on its facilities and equipment shall be subject to the prior approval of the City as to size, shape and placement of same.

21.11

Use of the Right-of-Way.

The right-of-way is for the use and enjoyment of the public and the public's right to such use shall not be infringed upon by any activity of the Concessionaire. Upon execution of this Agreement, Concessionaire acknowledges that all of the rights-of-way within the Concession Area are public, and as such, concession operations must not restrict, or appear to restrict, access to the general public, or in any way limit the public nature or ambiance of the adjacent area. The Concessionaire will conduct its operations so as to maintain a reasonably quiet and tranquil environment for the adjacent area, and make no public disturbances.

21.12

Conflict of Interest.

Concessionaire shall perform its services under this Agreement and conduct the concession operations contemplated herein, in a manner so as to show no preference for other concession operations/facilities owned, operated, managed, or otherwise controlled by Concessionaire with regard to its responsibilities pursuant to this Concession Agreement.

21.13

Reasonableness.

Notwithstanding anything to the contrary in this Agreement, including but not limited to references to "sole option" or "sole discretion" or words of similar meaning, in each instance in which the approval or consent or other action of the City Commission or the City Manager or his designee is allowed or required in this Agreement, such approval, consent or other action shall not be unreasonably withheld, conditioned or delayed.

21.14

Procedure for Approvals and/or Consents.

Intentionally Omitted.

21.15

No Waiver.

No waiver of any covenant or condition of this Agreement by either party shall be deemed to imply or constitute a waiver in the future of the same covenant or condition or of any other covenant or condition of this Agreement.

21.16 No Third Party Beneficiary.

Nothing in this Agreement shall confer upon any person or entity, including, but not limited to subconcessionaires, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.

21.17 Attorneys' Fees.

If it becomes necessary for City or Concessionaire to enforce their respective rights under this Agreement or any part hereof through litigation, Concessionaire and City agree that the prevailing party shall be entitled to recover from the other party all costs and expenses of such litigation, including a reasonable attorneys' fee and costs, for all trial and appellate proceedings.

SECTION 22. LIMITATION OF LIABILITY.

The City desires to enter into this Agreement only if in so doing the City can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of \$10,000.00. Concessionaire hereby expresses its willingness to enter into this Agreement with a \$10,000.00 limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the separate consideration of \$10.00, the receipt of which is hereby acknowledged, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of \$10,000.00, for any action for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of limitation placed upon the City's liability as set forth in Florida Statutes, Section 68.28.

SECTION 23. VENUE.

This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONCESSIONAIRE MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA(S).**

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed, all as of the day and year first above written, indicating their agreement.

PASSED AND ADOPTED THIS _____, 2004.

Attest:

CITY OF MIAMI BEACH

CITY CLERK

MAYOR

Witness:

THE MARKET COMPANY, INC.

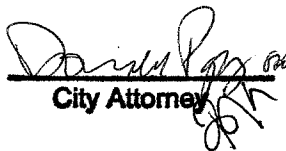
Signature

Name and Title of Signatory

JMG/CMC/JD/rlr

F:\DDHP\ALL\ASSET\Markets\LincolnRoad\LincolnRoadConcessionAgreement.Final.doc

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION



City Attorney

3/12/04

Date

EXHIBIT 2.0

(Page 1 of 2)
Site Plan

PENDING CONCESSIONAIRE

EXHIBIT 2.0

(Page 2 of 2)

PENDING FIRE DEPARTMENT

EXHIBIT 3.1

(Rental Fee Schedule)

PENDING CONCESSIONAIRE

EXHIBIT 3.1.1

(Facilities Design)

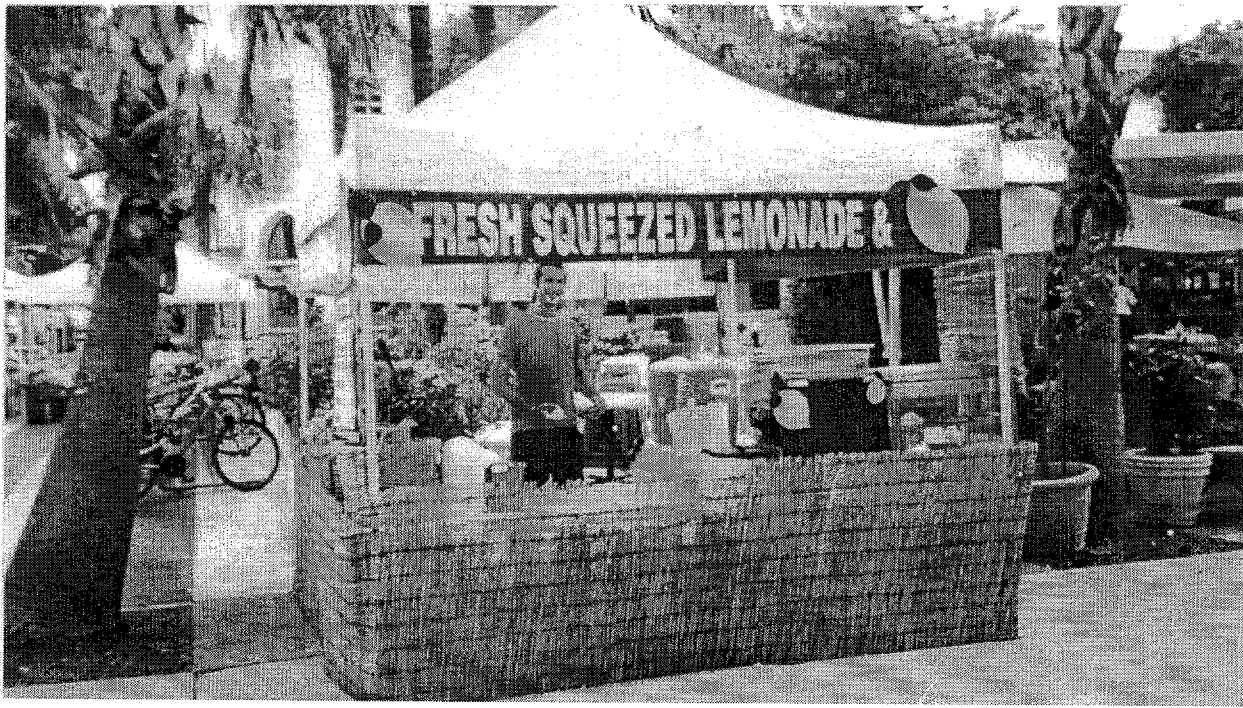
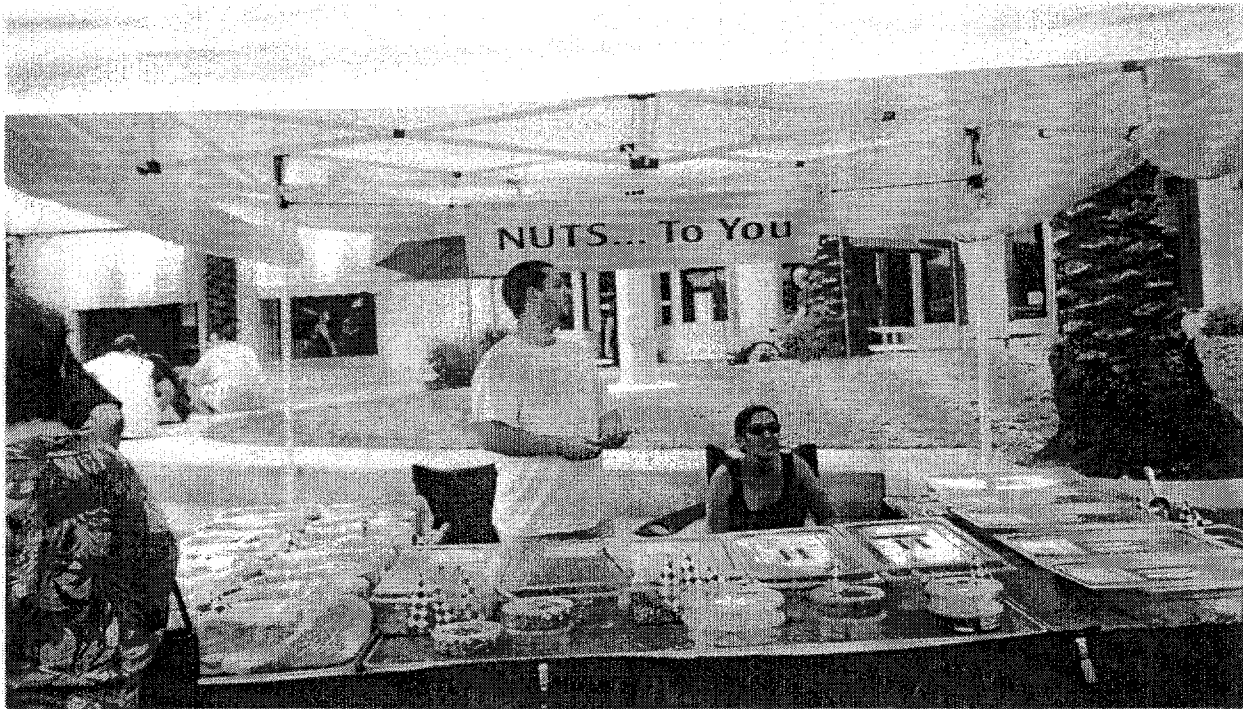


EXHIBIT 3.1.2.1

(Page 1 of 2)

(Special Events Disability Access Punch List)

Special Events Disability Access Punch List

1. Ensure curb cuts and cross walks are kept free and clear for usage, with a continuous accessible route of 44 inches in width.
2. The Event Producer must ensure that any nearby accessible on- or off-street parking ("handicapped parking") is not obstructed by vehicles loading/unloading equipment, etc. If such obstructions occur, the Event Producer must see that such obstructions are removed immediately. Accessible parking spaces shall be connected to the site's continuous accessible route, with no obstructions between the accessible parking spaces and the curb ramps that serve those spaces.
3. Any and all accessible routes created and/or installed by the Event Producer, or under the Event Producer's supervision, must have no abrupt change in level in excess of $\frac{1}{4}$ inch. Where such changes in level are present, properly bevel the change in level at a 1:2 ratio or provide a ramp with a slope not to exceed a 1:12 ratio. This is necessary to allow passage of wheelchairs or strollers and prevent tripping or the catching of walkers and canes. Any ramps provided must be in compliance with all Florida Accessibility Code requirements, including, but not limited to, requirements regarding edge protection, handrails, and surface.
4. Provide a smooth transition between temporary pathways and any ramps, sidewalks, streets, or parking lots. This means no change in level exceeding $\frac{1}{4}$ inch. Any change exceeding $\frac{1}{4}$ inch requires beveling at a 1:2 ratio or the installation of a ramp with a slope not to exceed a 1:12 ratio. Any ramps provided must be in compliance with all Florida Accessibility Code requirements, including, but not limited to, requirements regarding edge protection, handrails, and surface.
5. All cashier counters (counters where money transactions occur) must be no higher than 36 inches maximum above finish floor, for a minimum length of 36 inches.
6. Maintain an accessible route for access to merchandise that is both within a vendor space, as well as merchandise not contained within a vendor space. If the overflow of merchandise for patron viewing is placed behind a booth, then provide adjacent access to the merchandise via a curb ramp, as well as the placement of a pathway with a stable and firm surface necessary for the use of wheelchairs and mobility aids.
7. Merchandise for display should be within a line of sight no higher than 48 inches for persons of short stature or wheelchair users. If merchandise is

EXHIBIT 3.1.2.1

(Page 2 of 2)

(Special Events Disability Access Punch List)

displayed higher than 48 inches, merchant must provide assistance to disabled customers in order to reach items.

8. All vendor spaces shall be located on an accessible route that is a minimum of 44 inches wide.
9. If tables and seating are provided for the consumption of food, all aisles adjacent to accessible fixed seating shall provide 30 inch by 48 inch clear floor space for wheelchairs. Where there are open positions along both sides of such aisles, the aisles shall be not less than 52 inches wide.
10. For wheelchair seating spaces provided at tables or counters, knee spaces at least 27 inches high, 30 inches wide, and 19 inches deep shall be provided. The tops of accessible tables and counters shall be from 28 inches to 34 inches above the finish floor or ground.
11. Where food or drink is served at counters exceeding 34 inches in height for consumption by customers seated on stools or standing at the counter, a portion of the main counter which is 60 inches in length minimum shall be provided in compliance with the requirements of Items #9 and #10 above, or service shall be available at accessible tables within the same area.
12. Where portable toilets are provided, an accessible route shall be provided to the toilets. Five percent of the total number of toilets must be accessible. If clusters of portable toilets are distributed throughout the site, then each cluster must have accessible units.
13. If general assembly seating or standing space is provided for audience members attending a public performance at a special event, reserved wheelchair seating must be provided. Such seating must be provided in a location that allows wheelchair users an unobstructed line of sight to the stage. If seating capacity accommodates greater than 300 persons, then accessible seating shall be dispersed throughout the venue.

EXHIBIT 3.2.1

(Product List)

PENDING CONCESSIONAIRE

EXHIBIT A

(Page 1 of 6)
(Vendor Guidelines)

The Market Company, Inc.
428 Española Way - Miami Beach, FL 33139
(305) 531-0038 t. - (305) 532-0082 f.

Vendor Guidelines

Definition of Vendor: All persons participating in a market. Merchants who own stores and participate in a market are also vendors and must follow vendor guidelines.

Market Location:

☐ Lincoln Road ☐ Espanola ☐ North Beach ☐ FestivArt ☐ Other _____

Market Days:

☐ Friday ☐ Saturday ☐ Sunday ☐ Monday

Market Hours:

_____ a.m. to _____ p.m. Sales stop at closing time.
or: _____ p.m. to _____ a.m. Sales stop at closing time.

Market Set-up:

as early as: _____ a.m. Street must be clear by _____ p.m.
or: _____ p.m. Street must be clear by _____ a.m.

The Market Company has a permit with the City of Miami Beach which designates set-up and break-down times. It is imperative that vendors follow these time guidelines. Vendors who do not follow the guidelines will be fined \$50 for the first offense, \$100 for the second offense and thereafter will not be allowed to return to the market.

Fee: \$ _____ + Sales Tax: \$ _____ + Insurance: \$ _____ = Total: \$ _____

Market Fees: Market fees must be paid in advance by the close of the day on the Thursday before the market is to be held. Fees can be paid in cash, check or credit card (automatic credit card deductions can be arranged). Payment is made at The Market Company office at 428 Española Way. This payment guarantees a reserved space in the market. If a vendor cannot attend a market for which payment has been made, cancellation made 48 hours in advance will transfer paid funds to the next market date. Funds will be forfeited if cancellation is not made.

Vendors who do not pay in advance but choose to come and obtain an unreserved space will pay prior to set up and will be assigned a space on a first come first served basis determined by the number of spaces available.

Markets Operate Rain or Shine. If a vendor elects to set up for product sales, even if rain reduces sales, a minimum fee of 50% will be charged. In the case of advanced payment, if a vendor questions whether a market will be set up due to rain, he should call the market coordinator to protect his funds.

Vendor Spaces are Assigned by The Market Company: Vendors are expected to attend each weekend. If a vendor misses two market days without notice his assigned space will be forfeited and he will re-apply for a market space.

EXHIBIT A

(Page 2 of 6)
(Vendor Guidelines)

Additional Markets: Vendors are welcomed to participate in multiple markets. For a vendor to be eligible to be in additional markets he must be prepared to stay in his original marketplace and apply to the additional markets.

Vendor Display Area: Vendors furnish their own tents, umbrellas, tables, cloths, carts, chairs, displays, trash cans, brooms and trash bags. Market standards are white 10x10 tents (Instashade, EZUp), green market umbrellas with stands and green table skirts (Dade Towel - 305/751-1284 \$ 3.75 linear foot). Market aesthetics are very important. Describe your area:

Tents and Umbrellas: Vendor's tents and umbrellas must be weighed down immediately after set-up. Immediately following set-up of tables, the table skirts must be installed. Vendors who do not follow these rules will be fined: \$50/first offense, \$100/second offense and thereafter not allowed to participate in a market.

Vendors Who Need Electricity: Vendors who need electricity may make a request to The Market Company representative for access to an approved electrical outlet. Vendors must provide heavy-duty grounded cords and a heavy-duty grounded connector. Cords exposed on the sidewalk or street must be covered with plastic heavy-duty covers and duck-taped in place. Vendors who provide light can use up to 300 watts per 10'x10' booth. If a vendor does not follow the guidelines for the use of electricity, the following fines will be instituted: \$50/first offense, \$100/second offense and thereafter the vendor will not be permitted participation.

Vendors Are Allowed A 10'x10' Space: All tables must fit within the 10'x10' space.

Vendor Behavior: Vendors must dress appropriately with shirts on at all times. Alcoholic beverage consumption by vendors is not allowed. Please see Vendor Rules & Regulations.

Vendor Clean-up: Vendors are responsible for removal of all trash related to their stand. They are not to use public trash cans. They are to remove trash from the street. Vendors are advised to bring their own trash receptacle and broom. If a vendor leaves trash he will be fined \$50/first offense. A second offense will cost \$100. Thereafter the vendor will not be allowed to participate in the market.

Vendor Rental Procedure: An appointment must be made with The Market Company to review the guidelines. The Market Company application and agreement must be completed and signed. Upon acceptance vendor will be allowed to participate in the market.

Signs/Pricing: No handwritten signs are allowed. Products must be priced either individually, by basket/crate or on a posted sign. Signs will be on white background only. The Market Company can recommend a sign maker.

State Sales Tax and Food Handling Permits: Vendors must provide The Market Company with a copy of all such licenses required prior to joining the market. In the case of a food handling license, vendors must provide monthly renewal prior to returning to the market. If a vendor does not follow the state guidelines for food handling they must leave the market.

Parking: Following loading/unloading, vendor's vehicles must be removed from loading/unloading area.

EXHIBIT A

(Page 3 of 6)
(Vendor Guidelines)

Agreement with Relevant Associations: The markets are designed as economic development for the area in which they are located. If there is a complaint from a business about a particular vendor selling products that interfere with his business The Market Company may have to ask a vendor to no longer participate in the event.

Lincoln Road, North Beach, Espanola Way and Espanola Way FestivArt and other markets.

Insurance: The Market Company has liability insurance in the amount of \$ 1,000,000 pursuant to permit requirements of the City of Miami Beach. Vendors must provide proof of insurance for their participation in the market which covers property damage, personal injury and product liability in the amount of \$1,000,000. This proof of insurance must accompany vendor's application. Most farm/business policies cover activities at the market. Check with your insurance carrier. If a vendor does not have insurance and cannot provide proof, he will be responsible for paying The Market Company \$ 5.00 each day to cover his property damage and personal injury liability. If he sells edible products which require product liability he will be responsible for paying \$ 8.00 each day which includes property damage, personal injury and product liability. Coverage is up to one million dollars in liability. Each vendor will sign an agreement accepting responsibility for any damages over one million dollars and agrees to hold harmless and indemnify The Market Company, its owners, agents and employees and The City of Miami Beach from any and all liability arising from participation and sales in the market.

EXHIBIT A

(Page 4 of 6)
(Vendor Guidelines)



Miami's Premier Special Events and Festival Company

428 Española Way - Miami Beach, FL 33139 - 305-531-0038

Addendum to the Market Company Vendor Guidelines **Vendor Rules & Regulations**

In order to provide a safe, secure and pleasant environment, The Market Company requests your cooperation in complying with the following vendor rules and regulations:

1. The use of profanity, loud, rude, disruptive or threatening behavior by any vendor or participant in the market is strictly prohibited.
2. Appropriate dress, including shirts and shoes or sandals, must be worn at all times.
3. No booth may be left unattended at anytime.
4. Smoking while manning a booth is strictly prohibited.
5. The playing of loud radios that disturb the pleasant shopping experience is strictly prohibited.
6. Taking unauthorized photographs or videos of vendors or their property is strictly prohibited.
7. The display, selling or soliciting of anything pornographic in nature is strictly prohibited.
8. Possession/consumption of alcoholic beverages and/or illegal substances is strictly prohibited.
9. The carrying of weapon(s) of any kind, possession of any item defined as a weapon, whether illegal or not is strictly prohibited.

I understand and accept the conditions set forth in the Market Company Vendor Guidelines and the Market Company Vendor Rules and Regulations.

Signed: _____ Date: _____

Your cooperation in abiding by the Market Company Vendor Guidelines and Vendor Rules and Regulations is appreciated. The Market Company or its designee, reserves the right to request that those who refuse to comply with the above conditions leave the market immediately.

EXHIBIT A

(Page 5 of 6)
(Vendor Guidelines)



Miami's Premier Special Events and Festival Company

The Market Company, Inc. - 428 Española Way - Miami Beach, Florida 33139

SUBJECT: LETTER OF TERMINATION AS A VENDOR IN THE MARKET.

To Whom It May Concern:

**This is to advise you that I,
do hereby resign my right to participate as a vendor in the market(s) presented by
The Market Company, effective immediately, because I have violated the terms of
agreement as set forth in the Vendor Guidelines and Vendor Rules and Regulations.
Such terms were agreed upon in the Last Chance Agreement which I signed on**

Sincerely,

EXHIBIT A

(Page 6 of 6)
(Vendor Guidelines)

The Market Company, Inc.
428 Española Way - Miami Beach, FL 33139
(305) 531-0038 t. - (305) 532-0082 f.

APPLICATION & AGREEMENT

Applicant: _____

Address: _____

City: _____ State: _____ ZIP CODE: _____

Business Name: _____ State of Florida Sales Tax #: _____

Phone: _____ E-mail: _____

Fax: _____ Cell: _____

Pager: _____

☐ North Beach ☐ Lincoln Rd ☐ FestivArt ☐ Espanola Way ☐ Other _____

Merchandise to be sold: _____

(Please continue on back of this page if necessary and initial your work).

I hereby agree to sell only such items which are listed on the application. I swear that all information is correct and complete. I hereby affirm that I have read the regulations and policies as outlined and agree to abide by all rules establishes for the operation of the markets. I further acknowledge that I am an independent contractor and take full responsibility for all activities conducted throughout the term of this permit and have property damage, personal injury and product liability insurance in the amount of \$1,000,000 and agree to hold harmless and indemnify The Market Company, its owners, agents and employees, and the City of Miami Beach from any and all liability arising from participation and sales in the market.

Fee: \$ _____ + Tax: \$ _____ + Insurance: \$ _____ = Total \$ _____

Name: _____ Signature: _____

Date: ____/____/____ Approved: _____

Claire Tomlin/The Market Company, Inc.

Note: Violation or falsification of any of the conditions set forth in this legal agreement will result in the immediate and permanent loss of permission to sell any product at a market sponsored by The Market Company, Inc.

EXHIBIT B

(Page 1 of 2)

(USDA Farmers Market Operating Guidelines)

Guidelines

Page 1 of 2

USDA Farmers Market Operating Guidelines

1. **Market Day, Time and Site:** The Market will be held every Friday from 10:00 a.m. to 2:00 p.m. in parking court #9 of USDA located on the corner of 12th Street and Independence Avenue, SW, Washington, D.C. Selling will not begin before 10:00 a.m. and will end promptly at 2:00 p.m. each market day. Due to space restrictions, latecomers will be located at Market Management's discretion. All vehicles must vacate the market site no later than 3:00 p.m.
2. **Producer-Only:** Farmers will only sell products which they grow or produce themselves.
3. **Products To Be Sold:** Fresh, high-quality fruits, vegetables, herbs, honey, jams and jellies, cheese, vinegars, cider, maple syrup, flowers, bedding plants, and potted plants may be available at the Market. Value-added products will be admitted at the discretion of Market Management.
4. **Commitment to Market:** Farmers/vendors must commit to the entire market season and participate on a regular basis. Product availability may limit participants' beginning and ending dates; therefore, a schedule will be developed prior to the start of the market season documenting the farmer/vendor commitment to the Market.
5. **Notification of Attendance:** Farmers/vendors must call within 48 hours of a market day if they cannot attend. Failure to provide proper notification may result in termination of farmer/vendor participation at the market.
6. **Gleaning:** Farmers/vendors must commit to supporting the USDA food gleaning/food recovery initiative in lieu of paying an entrance fee. This commitment requires farmers and vendors to donate surplus food and food products at the end of each market to a local nonprofit organization identified by USDA.
7. **Tax Deductions for Gleaning:** Questions about tax deductions for gleaning should be referred to the Internal Revenue Service or a tax advisor. Receipts for donated foods may be obtained from the receiving nonprofit organization.
8. **Space:** One vehicle is permitted per space; all other vehicles must be removed from the immediate market premises. One space is 16 x 17 feet, and all trucks must fit within that area. (Exception: ice cream vendor)
9. **Signage:** Farmers/vendors must clearly display the name of their farm/business and post prices for all items being sold.
10. **Clean-up:** Farmers/vendors are responsible for cleaning all trash and waste within and

EXHIBIT B

(Page 2 of 2)

(USDA Farmers Market Operating Guidelines)

Guidelines

Page 2 of 2

around their allotted space. Garbage bins are provided on the market site for this purpose.

11. Applications: All new and returning farmers/vendors must complete an application each year listing the types of products to be sold during the season. This helps to correct any changes to a farm/business in the past year and also helps to ensure a good product mix will be offered at the Market.

12. Farm/Business Visits: USDA Farmers Market Management may visit farm/business locations to verify compliance with Market criteria and guidelines. Farmers/vendors should submit a map and directions to their farm/business location along with the Market application.

13. Noncompliance: The U.S. Department of Agriculture reserves the right to refuse acceptance of any vendor or item that is not in keeping with the rules or quality of USDA criteria and guidelines.

VENDOR CERTIFICATION

(Please detach, sign and return this page to USDA Farmers Market Management)

By signing below, I certify that I have read, understand and will adhere to all applicable guidelines as stated in this document. I further understand that should I fail to comply with these specified guidelines, my participation in the USDA Farmers Market could be terminated.

Signature of Farmer/Vendor

Date

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE A CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF MIAMI BEACH AND THE MARKET COMPANY, INC., FOR THE MANAGEMENT AND OPERATION OF A STREET MARKET IN THAT PORTION OF THE RUE VENDOME PUBLIC RIGHT-OF-WAY, BETWEEN 71ST STREET AND NORMANDY DRIVE; SAID AGREEMENT HAVING AN INITIAL TERM OF ONE (1) YEAR, COMMENCING ON APRIL 1, 2004, AND EXPIRING ON MARCH 31, 2005, WITH AN OPTION TO RENEW, AT THE CITY'S SOLE DISCRETION, FOR AN ADDITIONAL ONE YEAR TERM, SUBJECT TO THE TERMS PROVIDED IN THE AGREEMENT

WHEREAS, on July 31, 2002, the Mayor and City Commission adopted Resolution No. 2002-24947, approving the issuance of Request for Proposals No. 57-01/02, for the operation and management of a green market on a portion of the Lincoln Road right of way, a street market on a portion of the Espanola Way right-of-way, and a street-market on Normandy Island on Rue Vendome (the RFP); and

WHEREAS, said RFP was issued, proposals were received from interested parties, and after an evaluation and selection process, recommendations were forwarded to the Mayor and City Commission; and

WHEREAS, on March 19, 2003, via Resolution 2003-25154, the Mayor and City Commission approved the selection of The Market Company, Inc. (Market Company) and authorized the City Administration to negotiate three (3) separate concession agreements for a: 1) Lincoln Road Green Market; 2) Espanola Way Street Market; and 3) Normandy Village Street Market; and

WHEREAS, the Administration has negotiated with The Market Company and agreement has been attained with regard to the Normandy Village Street Market Concession Agreement, as attached hereto; and

WHEREAS, said Agreement has an initial term of one (1) year, commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one (1) year term; and

WHEREAS, said Concession Agreement is also terminable for convenience by either party and without cause, upon thirty (30) days written notice to the other party.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission approve and authorize the Mayor and City Clerk to execute the attached

Concession Agreement by and between the City Of Miami Beach and the Market Company, Inc., for the Management and Operation of a Street Market in that Portion of the Rue Vendome public right-of-way, between Normandy Drive and 71st Street; said Agreement having an initial term of one (1) year, commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one year term, subject to the terms provided in the Agreement.

PASSED AND ADOPTED THIS 17th day of March 2004.

CITY CLERK

MAYOR

JMG:CMC:JD:rlr

F:\DDHP\ALL\ASSET\MARKETS\NORMANDYISLE\NORMANDYMARKET.RES.DOC

**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**

 3/17/04
City Attorney **Date**

The Market Company, Inc.

Management and Operation Agreement for the Normandy Village Street Market

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**CONCESSION AGREEMENT BETWEEN
CITY OF MIAMI BEACH, FLORIDA AND
THE MARKET COMPANY, INC.
FOR MANAGEMENT AND OPERATION OF THE
NORMANDY VILLAGE STREET MARKET
PURSUANT TO REQUEST FOR PROPOSALS NO. 67-01/02**

THIS AGREEMENT made the _____ day of _____, 2004, between the **CITY OF MIAMI BEACH**, a municipal corporation of the State of Florida (hereinafter called "City"), having its principal address at 1700 Convention Center Drive, Miami Beach, Florida, 33139, and **THE MARKET COMPANY, INC.**, a corporation established pursuant to the laws of the State of Florida, with offices at 428 Espanola Way, Miami Beach, Florida 33139 (hereinafter called "Concessionaire").

WITNESSETH

WHEREAS, on July 31, 2002, the Mayor and City Commission adopted Resolution No. 2002-24947, authorizing the Administration to issue a Request for Proposals (RFP) for the management and operation of street markets at various locations within the City; and

WHEREAS, on August 20, 2003, said RFP was issued, responses were received and evaluated, and recommendations were forwarded to the Mayor and City Commission; and

WHEREAS, on March 19, 2003, the Mayor and City Commission adopted Resolution No. 2003-25154, authorizing the Administration to enter into negotiations, via three (3) separate concession agreements, with The Market Company, Inc. (Concessionaire) for the operation and management of street markets on 1) Lincoln Road, 2) Espanola Way and 3) Normandy Village; and

WHEREAS, the Administration has successfully negotiated the foregoing Concession Agreement with The Market Company, Inc., for the operation and management of the Normandy Village Street Market, on a portion of the public right-of-way known as Rue Vendome (between 71st Street and Normandy Drive), said Agreement commencing on April 1, 2004, and expiring on March 31, 2005, with an option to renew, at the City's sole discretion, for an additional one (1) year term.

NOW THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained and other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, it is agreed by the parties hereto as follows:

The City hereby grants to the Concessionaire, and the Concessionaire hereby accepts from the City, the exclusive right to operate the following described concession within the Concession Area, as defined herein, in conformance with the purposes and for the period stated herein, and subject to all the terms and conditions herein contained and fairly implied by the terms hereinafter set forth.

SECTION 1. TERM.

- 1.1 This Agreement shall be for an initial term of one (1) year, commencing on **April 1, 2004** (the "Commencement Date"), and ending on **March 31, 2005**.
- 1.2 Provided that the Concessionaire is not in default under **Section 13** hereof, and at the City's sole discretion, commencing upon written notice from Concessionaire to the City, which notice shall be given no later than 90 days prior to the expiration of the initial term of the Agreement. The City may extend the term of this Agreement for an additional one (1) year period, commencing on **April 1, 2004**, and ending on **March 31, 2005**.

SECTION 2. CONCESSION AREA.

The City hereby grants to the Concessionaire the exclusive right, during the term of this Agreement, to operate a concession for an open air street market, as described herein, in the following area(s) (hereinafter referred to collectively as the "Concession Area"), as more specifically delineated in Exhibit 2.0 herein:

- 2.1 Rue Vendome.
This Concession Area is limited to the public right-of-way bounded on the south by the northernmost line of the 71st Street right-of-way; bounded on the north by the southernmost line of the Normandy Drive right-of-way; bounded on the west by the easternmost edge of the sidewalk line of Rue Vendome; and bounded on the east by the westernmost edge of the sidewalk line of Rue Vendome. The Concession Area does not include those portions of the public right-of-way where fountains, seating, or other public amenities or other uses authorized/licensed/permitted by the City are currently located or may be located in the future.
- 2.2 Notwithstanding the use of the Concession Area granted to Concessionaire above, Concessionaire herein understands, agrees, and acknowledges that the Concession Area, along with any and all other public right-of-way area(s) not specifically identified herein, are public and, as such, must remain available for the use and enjoyment of the general public whether or not the public chooses to purchase any of Concessionaire's goods, or otherwise partake of any of the services it provides. In the event that a member of the public is within a particular area of the Concession Area, Concessionaire agrees to allow for his/her continued peaceful enjoyment of said area.

SECTION 3. USE(S).

The Concessionaire is hereby authorized to conduct the following kind(s) of business(es) within the Concession Area, as provided below, all at its sole cost and expense:

- 3.1 Concessionaire shall operate and manage an open air street market, commonly known and referred to herein as the "Normandy Village Street Market" (the Market), which shall provide a venue for vendors to sell and/or provide the following (as each is more specifically defined in Section 3.2):
 - a) Arts and Crafts Merchandise;

- b) Plants and Cut Flowers; and
- c) Fruits, vegetables, and other edible products and related food items;

This shall also generally include the rental of booths, tents, tables, signs or space(s) (collectively the "facilities"), in conformance with the attached site plan (Exhibit 2.0). The City herein approves the rental of the aforestated facilities, and the prices for same, all as set forth in Exhibit 3.1, and as provided in Section 18. Any amendments to Exhibit 3.1 must be approved in writing by the City Manager or his designee and, prior to implementation of same, a new Exhibit 3.1 shall be incorporated herein.

3.1.1 Facilities Design:

The design, type, material, and color of any and all facilities, as defined above, shall be approved in writing by the City's Planning Department prior to the Commencement Date of this Agreement. A photo or photo(s) of City-approved facilities is incorporated herein as Exhibit 3.1.1. Thereafter, Concessionaire shall not change, alter, or modify said City-approved design, type, material and color of any facilities without the prior written consent of the City Manager or his designee, and, if so approved, an updated Exhibit 3.1.1 will be made a part of and incorporated into this Agreement.

3.1.2 Placement of Facilities:

All respective facilities within the Concession Area shall be placed substantially in accordance with the attached site plans, herein approved by the City and attached hereto and incorporated as Exhibit 2.0 herein. Concessionaire shall not deviate from or alter the approved site plans without the prior written consent of the City Manager or his designee.

3.1.2.1 Compliance with American with Disabilities Act (ADA) and any other applicable accessibility standards:

Concessionaire agrees and acknowledges that during all periods when its Market is in operation, including set-up and break-down periods, it shall comply with ADA standards, Florida Accessibility Code standards, and any other applicable accessibility standards required by law, including the provisions of the City's "Special Events Disability Access Punch List", attached hereto and incorporated as Exhibit 3.1.2.1 herein. Concessionaire's compliance with the provisions set forth in the attached Exhibit 3.1.2.1, includes, but shall not be limited to, any and all responsibilities associated with "Event Producer" as described therein.

3.1.2.2 The Concessionaire's responsibility to comply with the aforementioned provisions in Subsection 3.1.2.1 include, but are not limited to, ensuring that there is an accessible

path of travel from the handicap designated parking spaces and public transportation stops within the boundary of, areas associated with, and entrances to Rue Vendome. Concessionaire shall:

- a) maintain accessible path(s) of travel that permit the unobstructed access to the entryways of all buildings, facilities, elements and spaces along Rue Vendome,
- b) maintain an unobstructed accessible path of travel on both the north sidewalk and the south sidewalk of Espanola Way, and
- c) maintain an unobstructed accessible path(s) of travel from the north walkway to the south walkway of Espanola Way.

3.1.2.3 Notwithstanding the above, Concessionaire's responsibility to comply with the requirements of this Section 3.1.2.1 and Section 3.1.2.2 shall be limited to those areas within the Concession Area as provided in Section 2.0 herein.

3.1.3

Set Up:

The set up of facilities to be placed within the Concession Area, substantially in accordance with the site plan(s) approved pursuant to Exhibit 2.0, shall be in accordance with the days and hours of operation in Section 9. Placement of vendor facilities shall be in accordance with and shall not exceed the maximum numbers, set forth in Exhibit 2.0, attached hereto and incorporated herein.

3.1.4

Public Right-of-Way:

The City and Concessionaire agree and acknowledge that the public's use of the public right-of way is a prime consideration and must be balanced accordingly with Concessionaire's proposed operations, as set forth herein. Accordingly, notwithstanding the site plans and maximum numbers (as provided for in the Set Up period) set forth in Subsection 3.1.3, Concessionaire further agrees that, notwithstanding its right to set up its maximum numbers, it will not alter or modify its site plans without the prior written consent of the City Manager or his designee.

Notwithstanding the preceding paragraph, City and Concessionaire may, from time to time, meet to review and, subject to City's prior written consent, revise the maximum numbers (as provided for in the Set-Up period) set forth in Subsection 3.1.3.

3.1.5

Interaction and Coordination with Other Normandy Village Operations and Events:

Concessionaire agrees and understands that there are other businesses, establishments, operations and events which are ongoing, or may occur from time to time within or in close proximity to, the Concession Area. As such, Concessionaire agrees that it will use its best efforts to cooperate and coordinate with said businesses, establishments, operations and events so as to minimize the impact to the respective parties.

3.1.6

Conflict Resolution:

Concessionaire recognizes and understands that conflicts with one or more of the following entities, groups, and/or individuals may arise during the term of this Agreement, or any extensions thereof:

- Conflicts between Normandy Village (or other) Merchants/Businesses and Concessionaire
- Conflicts between Vendors and Concessionaire
- Conflicts between Vendors and the General Public
- Conflicts between General Public and Concessionaire

As such, Concessionaire further recognizes and understands that notice of said conflicts may be directed to the attention of Concessionaire or the City. In the event a notice of conflict is communicated to the City, the City will communicate same to the Concessionaire, as soon as practicable.

Whenever a conflict arises, upon Concessionaire's receipt of notice of same, whether written or verbal, between any of the aforesaid entities, groups, or individuals, with any of Concessionaire's operations, resolution to said conflicts will be addressed in the following manner:

1. Concessionaire shall meet with the conflicted party and endeavor, using its best efforts and good faith, to resolve the conflict to the satisfaction of all parties concerned within fourteen (14) calendar days from receipt of notice.
2. In the event the conflict cannot be resolved as stated in Number 1 above, then the Concessionaire shall provide written notice to the conflicted party, (with copy to the City Manager's designee) with a date on which to meet with the City Manager's designee, to address the conflict. At that time, the City Manager's designee will recommend a resolution. The City Manager's designee shall endeavor to set a meeting date within fourteen (14) calendar days of receipt of a copy of the written notice to the conflicted party. For purposes of this Section, the City Manager's designee shall be the Asset Manager of the City.

3. In the event the resolution recommended by the City Manager's designee is not acceptable to the Concessionaire or the conflicted party, the City Manager's designee shall inform the City Manager, and provide him with the pertinent details of the conflict. The City Manager may make a determination as to whether he concurs with the designee's recommendation; offer an alternate resolution; or choose to meet with Concessionaire and the conflicted party to get additional information prior to making a final determination.

Notwithstanding the foregoing, the City Manager's final determination, will be binding upon Concessionaire, and Concessionaire shall agree to be bound by same.

Concessionaire agrees and understands that the above referenced conflict resolution language is not applicable to any conflicts that may arise between the City and the Concessionaire pursuant to this Agreement, or conflicts outside of the City's purview, control or jurisdiction.

- 3.1.7 The condition and quality of Concessionaire's facilities shall at all times be maintained in a manner that is consistent with the condition and quality of similar facilities in first class open air markets located in other world class areas. It is the City's intent, and Concessionaire hereby agrees and acknowledges same, to develop and promote world class open air street market facilities and operations that would be comparable to those found in other world class public areas. Accordingly, Concessionaire shall not only, at a minimum, ensure that all facilities placed within the Concession Area are well maintained and in usable condition, but shall adhere, as indicated in this Subsection, to high ongoing maintenance standards for same consistent with the aforementioned condition and quality.
- 3.1.8 Quality of goods and services offered will be first-rate and comparable to that available in open air markets in other world class areas on par with the City of Miami Beach or, at a minimum, to the quality and pricing of goods and services provided by privately owned businesses selling like goods and services within the City of Miami Beach.
- 3.1.9 In addition to Concessionaire's general maintenance obligations for the Concession Area, as set forth in Section 10 hereof, all portions of the Concession Area, and the immediately surrounding 25-foot adjacent areas, shall at all times be maintained in a clean and sanitary manner.
- 3.1.10 The concession operations shall be offered to patrons at all times during the days and hours of operation set forth in Section 9 herein. However, if the City, at its sole discretion, deems that there is a decrease in demand for the concession operations, or if the

Concessionaire provides the City with written notice that it is desirous of reducing its hours of operation, (i) the City shall provide Concessionaire with a minimum of two (2) weeks prior written notice, requesting the specific decrease in Concessionaire's operation, or (ii) Concessionaire shall provide the City with, at minimum, two weeks prior written notice, requesting to reduce said hours, for the City's written approval (which shall not be unreasonably withheld) prior to implementing said schedule of reduced hours of operation. Said notice to the City shall include the newly proposed schedule of operation.

Similarly, if Concessionaire is desirous of increasing its hours of operation in the Concession Area then, in that event, the Concessionaire shall obtain the City's prior written consent.

Concessionaire agrees and acknowledges that any Concessionaire requested reduction in the scheduled hours of operation as may be provided herein shall not in any way reduce Concessionaire's financial responsibility to the City, as required in Section 4, except if same is deemed by the City to be a partial termination pursuant to Subsection 13.6.3.

3.2 Permitted Concession Operations / Uses.

3.2.1 Arts and Crafts:

This shall generally include the sale of those goods and items identified in Exhibit 3.2.1, substantially in accordance with the price ranges set forth therein. Any amendments to Exhibit 3.2.1, whether as to changes and/or additions of goods and items to be offered for sale, or in the respective price ranges for same, must be approved in writing by the City Manager or his designee, prior to such changes and/or additions being implemented and a new updated Exhibit 3.2.1 will be incorporated into this Agreement.

3.2.2 Cut Flowers and Plants:

This shall generally include the sale of flowers, either individually or in bunches that have been cut from their base, and potted plants.

3.2.3 Fruits, Vegetables, Other Edible Products:

This shall generally include the sale of those edible items defined as, and generally including, fresh fruits, dried fruits, vegetables, nuts, preserves, pickled items, jams, jellies, juices, smoothies, and other non-alcoholic beverages.

3.2.4 In the event that the City Manager or his designee determines, at his sole option and discretion, that all or a portion of Concessionaire's proposed uses, pursuant to Subsection 3.1 and as defined in Section 3.2, are no longer desired, then the City may revoke Concessionaire's right to provide all or a portion of said uses, without cause, upon thirty

(30) days written notice to Concessionaire. Any percentage of gross paid by Concessionaire (pursuant to Subsections 4.2 and 4.3) to City with regard to a delete/discontinued use, shall be prorated and/or adjusted accordingly as of the date of termination of said use, and no further payment shall be required for same during the term of this Agreement, unless the City reinstates the use, at which time the payment provisions of Subsections 4.2 and 4.3 shall once again apply.

3.3 Intentionally Omitted.

3.4 Intentionally Omitted.

3.5 Intentionally Omitted.

3.6 Off-Duty Police / Field Monitor.

3.6.1 Off-Duty Police:

Off-duty Police services are not contemplated as of the execution date of this Agreement. However, in the event the City deems, in its reasonable discretion, that Off-duty Police officer services are required, as same may be warranted by changes in Market conditions or operations, the parties herein agree to meet and discuss said proposed changes.

3.6.2 Field Monitor:

Additionally, Concessionaire agrees and understands that a Field Monitor, who will report to and be under the direction of the City, is required for a minimum of two (2) hours daily on Saturday and Sunday mornings in order to assist and facilitate during set-up times. Concessionaire further agrees and understands that any and all costs associated with said Field Monitor shall be borne by Concessionaire and reimbursed to the City on a monthly basis, along with its regularly scheduled monthly payments pursuant to Section 4.2 herein. Concessionaire's responsibility for the costs associated with said Field Monitor position for the initial term shall be limited to Seventeen (\$17.00) Dollars per hour. During the renewal term, said limit shall be increased by 3% per contract year or by the annual Consumer Price Index, All Urban Consumers, as reported by the U.S. Bureau of Labor Statistics (CPI), whichever is greater.

3.6.3 Concessionaire supervisory/management employee shall be on duty and on-site within the Concession Area, or available via telephone, at all times during which the Market is operating, including but not limited to Set-Up and Move-Out periods, as defined in Subsection 9.2 herein.

3.7 Vendor Selection / First Priority to Miami Beach Merchants.

3.7.1 Within thirty (30) days from the Commencement Date of this

Concession Agreement, and for a period of thirty (30) days thereafter, the Concessionaire shall offer Miami Beach licensed merchants the opportunity to participate (a booth space in the Market) as vendors before opening its search to the general public or other networks. The Concessionaire will establish this "pool" and will also serve as the clearinghouse for booth availability and vendor applicants. The Concessionaire shall commit to use this clearinghouse during the initial availability of booth space before expanding its search to other networks.

The Concessionaire will use best efforts to ensure that all Miami Beach licensed merchants are contacted and that announcements regarding booth availability are disseminated throughout the City of Miami Beach, as quickly as possible so as to take optimum advantage of the thirty (30) day availability period, including but not limited to, advertising in a local newspaper, placing information on the Market or other websites, or other similar efforts.

The Concessionaire will make itself available to answer any questions potential applicants may have about the Market.

3.7.2 Notwithstanding the foregoing, and for purposes of this Section 3.7, in the event that the number of responsive Miami Beach licensed merchants desirous of participating in the Market would cause Concessionaire to displace any vendors who have been and are currently and actively participating in the Market as of the date of execution of this Agreement, and such displacement is directly due to lack of available space within the Concession Area, then in such event Concessionaire and the City agree to meet and discuss, in good faith, and make reasonable efforts to resolve this matter. It is understood by the parties herein, that the intent of this Subsection 3.7 is not to displace vendors who are currently and actively participating in the Market but to provide opportunities for those Miami Beach licensed merchants who desire to participate in the Market.

3.7.3 The Concessionaire will keep and make available to the City for inspection, upon notice by the City, carefully detailed records, including the name, address, telephone numbers, qualifications, experience, and the proposed goods and services to be offered for sale by its vendors, and will pay particular attention to matching vendors and booths with appropriate locations.

3.8 Removal of Concession Facilities.

Concessionaire agrees that all its facilities or other items used in the concession operations will be removed from the public right-of-way/Concession Area and said removal shall be done on a daily basis, in compliance with the time parameter(s) set forth in Subsection 9.2 herein.

- 3.9 Hurricane Evacuation Plan.
Concessionaire agrees that all its facilities or other items used in the concession operations will be removed from the public right-of-way/Concession Area and said removal shall immediately begin no later than upon the issuance of a Hurricane Warning by the Miami-Dade County Office of Emergency Management, and stored at a private, off-site location.
- 3.10 City Occupational Licenses.
Concessionaire shall obtain, at its sole cost and expense, any occupational licenses required by City law, as amended from time to time, for its proposed operations, as contemplated in Section 3 of this Agreement. For purposes of this Agreement, Concessionaire shall obtain the applicable "Promoters" category City occupational license.

SECTION 4. CONCESSION FEES.

- 4.1 Security Deposit.
Upon execution of this Agreement Concessionaire shall furnish the City with a Security Deposit, in the amount of Four Hundred (\$400) Dollars (approximately equal to one month's rent based on the Market's prior year's actual revenues). Said Security Deposit shall serve to secure Concessionaire's performance in accordance with the provisions of this Agreement. In the event the Concessionaire fails to perform in accordance with said provisions, the City may retain said Security Deposit, as well as pursue any and all other legal remedies provided herein, or as may be provided by applicable law.
- The parties agree and acknowledge that the foregoing condition is intended to be a condition subsequent to the City's approval of this Agreement. Accordingly, in the event that Concessionaire does not satisfy the aforesated condition within the time periods provided herein, then the City Manager or his designee may immediately, without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to him for breach of contract.
- 4.2 Percentage of Gross (vs.) MG (PG).
During the initial term, and any renewal term, of the Agreement, Concessionaire shall pay the City, on a monthly basis, and within thirty (30) calendar days from the end of each month during the term herein, an amount equal to fifteen (15%) percent of Concessionaire's gross receipts (PG). In the event that the annual PG is less than the amount provided in Subsection 4.3 below, then the Concessionaire shall also pay to the City, on an annual basis, the difference between the PG amount and the amount provided in Subsection 4.3 below, no later than 30 days after the expiration of the initial term, or of the renewal term of this Agreement, as the case may be.
- Notwithstanding the above, in the event Concessionaire's annual gross receipts exceed 110% of its prior year gross receipts, Concessionaire shall pay to the City an additional amount equal to 2.5% of those gross receipts

that exceed 100%, through and including those gross receipts that equal 120% of its prior year's gross receipts; and

In the event Concessionaire's annual gross receipts exceed 120% of its prior year gross receipts, Concessionaire shall also pay to the City an additional amount equal to 5% of those gross receipts that exceed 120% of its prior year's gross receipts.

The term "gross receipts" is understood to mean all income, whether collected or accrued, derived by the Concessionaire under the privileges granted by this Agreement, excluding amounts of any Federal, State, or City sales tax, or other tax, governmental imposition, assessment, charge or expense of any kind, collected by the Concessionaire from customers and required by law to be remitted to the taxing or other governmental authority. Except as otherwise provided, with regard to a special event under Subsection 16.1 hereof in which Concessionaire is not permitted to continue operating, the pro-rata share due to the City for the event days will be abated.

4.3 Minimum Guarantee (MG).

Notwithstanding the PG payment required pursuant to Subsection 4.2, and in consideration of the City executing this Agreement and granting the rights provided in this Agreement, Concessionaire shall pay to the City a Minimum Guaranteed Annual Concession Fee (MG) of Three Thousand Five Hundred Dollars (\$3,500) for the initial term. Said initial MG is based on a percentage (approximately 75%) of the Calendar Year 2003 revenues received by the City of Miami Beach, from The Market Company, Inc., pursuant to the Market Company's Special Event permit for the Espanola Way Market for the respective time period, and shall be paid annually in accordance with Sections 4.2 and 4.3, as applicable.

In the event that the City, at its sole discretion, chooses to extend the term of this Agreement for the additional one (1) year renewal term, the renewal term year MG shall be automatically increased, by five percent (5%) from the previous year's MG, or seventy five (75%) percent of the prior year revenues remitted to the City, whichever is greater, and shall be due and payable to the City, in accordance with Sections 4.2 and 4.3, as applicable.

4.4 Cost for Use of Electricity.

Concessionaire shall also remit to the City, along with its monthly payments required under Section 4.2, an amount equal to two dollars (\$2.00) per Market day, plus applicable sales and use tax, for each vendor location that proposes to use electricity.

4.5 Interest for Late Payment.

Any payment which Concessionaire is required to make to City which is not paid on or before the respective date provided for in this Agreement shall be subject to interest at the rate of twelve percent (12%) per annum, from the due date of payment until such time as payment is actually received by the

City.

4.6

Sales and Use Tax.

It is also understood that, if applicable, the required Florida State Sales and Use Tax shall be added to Concessionaire's payments and forwarded to the City as part of said payments. It is the City's intent that it is to receive all payments due from Concessionaire as net of such Florida State Sales and Use Tax.

SECTION 5. MAINTENANCE AND EXAMINATION OF RECORDS.

Concessionaire shall maintain current, accurate, and complete financial records on an accrual basis of accounting related to its operations pursuant to this Agreement. Systems and procedures used to maintain these records shall include a system of internal controls and all accounting records shall be maintained in accordance with generally accepted accounting principles and shall be open to inspection and audit, but not photocopying, by the City Manager or his designee upon reasonable prior request and during normal business hours. Such records and accounts shall include a breakdown of gross receipts, expenses, and profit and loss statements and such records shall be maintained as would be required by an independent CPA in order to audit a statement of annual gross receipts and profit and loss statement pursuant to generally accepted accounting principles.

A monthly report of gross receipts must be submitted to the City, through the Finance Department's Revenue Manager, to be received no later than thirty (30) days after the close of each month.

SECTION 6. INSPECTION AND AUDIT.

Concessionaire shall maintain its financial records pertaining to its operations for a period of three (3) years after the conclusion of the initial term, or (if approved) the renewal term, and such records shall be open and available to the City Manager or his designee, as deemed necessary by the City Manager or his designee. Concessionaire shall maintain all such records at its principal office, currently located at 428 Espanola Way, Miami Beach, Florida, 33139 or, if moved to another location, all such records shall be relocated, at Concessionaire's expense, to a location within the City of Miami Beach, within ten (10) days' written notice from the City that the City desires to review said records.

The City Manager or his designee shall be entitled to audit Concessionaire's records pertaining to its operation as often as it deems reasonably necessary throughout the term of this Agreement, and three (3) times within the three (3) year period following termination of the Agreement, regardless of whether such termination results from the natural expiration of the term or for any other reason. The City shall be responsible for paying all costs associated with such audits, unless the audit(s) reveals a deficiency of five percent (5%) or more in Concessionaire's statement of gross receipts for any year or years audited, in which case the firm shall pay to the City, within thirty (30) days of the audit being deemed final (as specified below), the cost of the audit and a sum equal to the amount of the deficiency revealed by the audit, plus interest; provided, however, the audit shall not be deemed final until Concessionaire has received the audit and has had a reasonable opportunity to review the audit and discuss the audit with the City. Nothing contained within this Section shall preclude the City's audit rights for resort tax collection purposes.

Concessionaire shall submit at the end of the initial term (and, if approved, the renewal term), an audited annual statement of gross receipts, in a form consistent with generally accepted accounting principles.

It is Concessionaire's intent to stay informed of comments and suggestions by the City regarding Concessionaire's performance under the Agreement. Within thirty (30) days after the end of the initial term (and, if approved, the renewal term), Concessionaire and City may meet to review Concessionaire's performance under the Agreement. At the meeting, Concessionaire and City may discuss quality, operational, maintenance and any other issues regarding Concessionaire's performance under the Agreement.

SECTION 7. TAXES, ASSESSMENTS, AND UTILITIES.

- 7.1 Concessionaire agrees to and shall pay before delinquency all taxes (including but not limited to resort taxes) and assessments of any kind assessed or levied upon Concessionaire by reason of this Agreement or by reason of the business or other activities and operations of Concessionaire upon or in connection with the Concession Area. Concessionaire will have the right, at its own expense, to contest the amount or validity, in whole or in part, of any tax and/or assessment by appropriate proceedings diligently conducted in good faith. Concessionaire may refrain from paying a tax or assessment to the extent it is contesting the assessment or imposition of same in a manner that is in accordance with law; provided, however, if, as a result of such contest, additional delinquency charges become due, Concessionaire shall be responsible for such delinquency charges, in addition to payment of the contested tax and/or assessment if so ordered.

Concessionaire shall also pay for any fees imposed by law for licenses or permits for any business, activities, or operations of Concessionaire upon the Concession Area.

Concessionaire shall pay before delinquency any and all charges for utilities used by, for, or on behalf of the operations contemplated herein (including, but not limited to, water, electricity, gas, heating, cooling, sewer, telephone, trash collection, etc.).

- 7.1.1 Electricity:
City acknowledges that Concessionaire may require electrical outlets to operate some vendor locations for registers, lighting fixtures, etc. Any usage of electricity from City-owned sources, shall be reimbursed to the City in accordance with the provisions outlined in Section 4.4 herein. Concessionaire agrees to remit to the City, on a monthly basis, along with the payment of rent, a list of all vendors which use electricity.

- 7.2 Procedure If Ad Valorem Taxes Assessed.
Notwithstanding Subsection 7.1 above, the parties agree that the concession operations contemplated herein are for public purposes and, therefore, no ad valorem taxes should be assessed by the Miami-Dade County Tax

Appraiser. If, however, said taxes are assessed, City and Concessionaire shall use reasonable efforts to address payment of same.

SECTION 8. EMPLOYEES AND INDEPENDENT CONTRACTORS.

- 8.1 In connection with the performance of its responsibilities hereunder, Concessionaire may hire its own employees and/or independent contractors, who will be employees and/or independent contractors of Concessionaire and not employees or agents of the City. Additionally, Concessionaire's vendors shall not be considered agents or employees of the City. Concessionaire shall select the number, function, qualifications, compensation, including benefits (if any), and may, at its discretion and at any time, adjust or revise the terms and conditions relating to its employees and/or independent contractors.
- 8.2 Concessionaire shall ensure that all its employees and/or independent contractors observe all the graces of personal grooming. The Concessionaire shall hire people to work in its concession operation who are neat, clean, well groomed and shall comport themselves in a professional and courteous manner, and ensure that its vendors and/or independent contractors comply with same. The Concessionaire and any persons hired by same, shall never have been convicted of a felony. If Concessionaire materially fails to comply with this provision the City may default Concessionaire pursuant to Section 13 herein.
- 8.3 The Concessionaire shall have an experienced manager or managers overseeing the concession operations at all times.

SECTION 9. SCHEDULE OF OPERATION.

Concessionaire's operations shall be open on the Concession Area, in accordance with the schedule outlined below, weather or events of force majeure permitting.

9.1 Day(s) of Operation: Saturdays only

9.2 Operating Hours:

Set-Up:

Must not begin earlier than 7:00 AM and end by 8:00 AM

Market operating hours:

Daylight Savings Time: 8:00 AM to 7:00 PM

Eastern Standard Time: 8:00 AM to 6:00 PM

Move-Out:

Daylight Savings Time: 7:00 PM to 8:00 PM

Eastern Standard Time: 6:00 PM to 7:00 PM

Any change in the days or hours of operation require the prior written consent of the City Manager including, but not limited to, change in the days and hours of operation requested

pursuant to Subsection 3.1.10.

SECTION 10. MAINTENANCE.

- 10.1 The Concessionaire accepts the use of the Concession Area provided in this Agreement in its "as is" condition. Concessionaire assumes sole responsibility and expense for maintenance of the Concession Area and its facilities therein. This shall include daily removal of litter, garbage and debris, said removal to be the sole responsibility and expense of Concessionaire. Daily maintenance shall be accomplished on all days and hours Concessionaire operates. Concessionaire agrees, also at its sole cost and expense, to pay for all garbage disposal generated by its operations.
- 10.2 Garbage Receptacles.
With respect to litter, garbage and debris removal, the Concessionaire shall provide, at its sole cost and expense, receptacles within the confines of the Concession Area and shall provide a sufficient number of these receptacles for its own use and for the use of the public that patronizes the Market. Disposal of the contents of said receptacles and removal of litter, garbage and debris within the Concession Area, shall be accomplished by the end of the day on all days on which the Concessionaire operates, and shall be the sole responsibility of the Concessionaire. Any costs for removal of the contents of said trash receptacles by the City, because of the Concessionaire's failure to do the same, will be charged to, and become the responsibility of, the Concessionaire. The dumping or disposal of any refuse, discards, trash or garbage, generated by, or as a result of the concession operations, into any City trash receptacles by the Concessionaire (including its staff, employees and/or vendors) shall be strictly prohibited. Determination of the "number" of receptacles shall at all times be within the City's sole discretion, and Concessionaire shall agree to be bound by same.
- 10.3 Pressure Cleaning.
Concessionaire shall be responsible, at its sole cost and expense, for the pressure cleaning of the Concession Area, including all abutting sidewalks and public right-of-way adjacent thereto, at least once every three (3) months, or on an as needed basis, as deemed by the City, in its sole discretion.
- 10.4 Facilities.
Intentionally Omitted.
- 10.5 Orderly Operation.
The Concessionaire shall have a neat and orderly operation at all times and shall be solely responsible for the necessary housekeeping services to properly maintain the Concession Area and all facilities incident thereto. The Concessionaire shall make available all operations and facilities within the Concession Area (including but not limited to vendor facilities) for examination during days and hours of operation by the City Manager or his authorized representative.

10.6 No Dangerous Materials.

10.6.1 The Concessionaire agrees not to use or permit in the Concession Area and/or facilities the storage and/or use of gasoline, fuel oils, diesel, illuminating oils, oil lamps, combustible powered electricity producing generators, turpentine, benzene, naphtha, propane, natural gas, or other similar substances, combustible materials, or explosives of any kind, or any substance or thing prohibited in the standard policies of fire insurance companies in the State of Florida. Any such substances or materials found within the Concession Area and/or facilities shall be immediately removed.

10.6.2 Notwithstanding any contrary provisions of this Agreement, Concessionaire, after the Commencement Date, shall indemnify and hold City harmless from any loss, damage, cost, or expense of the City, including, without limitation, reasonable attorney's fees, incurred as a result of, arising from, or connected with the placement by Concessionaire, and/or its employees, vendors, agents and/or subcontractors, after the Commencement Date, but during the term of this Agreement, of any hazardous substance or petroleum products on, under, in or upon the Concession Area as those terms are defined by applicable Federal and State Statute, or any environmental rules and environmental regulations promulgated thereunder; provided, however, Concessionaire shall have no liability in the event of the willful misconduct or gross negligence of the City, its agents, servants or employees. The provisions of this Subsection 10.6 shall survive the termination or earlier expiration of this Agreement.

10.7 Security.

The Concessionaire shall be responsible for and provide reasonable security measures which may be required to protect the Concession Area and any of the facilities, goods and/or other equipment thereon. Under no circumstances shall the City be responsible for any stolen or damaged goods, facilities, materials and/or other equipment, nor shall City be responsible for any stolen or damaged personal property of Concessionaire's employees, vendors, patrons, guests, invitees, and/or other third parties.

10.8 Vehicles on the Public Right-of-Way.

Concessionaire's employees, vendors, patrons, guests, invitees, and/or other third parties vehicles and/or trailers shall only be allowed on the street adjacent to Concession Area/public right-of-way for purposes of setting up the concession operations, and to remove same at the close of operations each day, and any and all such vehicles for purposes thereon must be removed from the public right-of-way immediately thereafter. Concessionaire shall contractually require that anyone operating a vehicle for, or on behalf of Concessionaire and/or its employees, agents, and/or vendors, must have a current valid Florida Driver's License. Said set-up and move-out operations shall only be permitted during regular hours for same, pursuant to Subsection 9.2 herein, and shall be completed safely and expeditiously. No

vehicular traffic or parking will be permitted on the public right-of-way during concession hours of operation, pursuant to Subsection 9.2 herein. Access to the public right-of-way shall only be permitted via specifically designated points authorized for such use and the nearest authorized access to a concession vendor's operation.

Vehicles operated on the public right-of-way shall not exceed 5 M.P.H. and shall only operate in the immediate vicinity of the concession, or to-and-from the nearest predetermined and assigned access point. After transporting facilities, goods, merchandise, equipment, and/or other items to the Concession Area, the vehicles shall be removed from the public right-of-way and parked in a legally authorized location. Driving on the public right-of-way shall be kept to a minimum. No vehicular traffic will be permitted on the public right-of-way, at any time or for any purpose, other than as stated herein.

Vehicle operator must inspect the vehicles perimeter and surrounding area, prior to turning the vehicles ignition switch, to assure a clear path of egress and only proceed with extreme caution.

10.9

Inspection.

The Concessionaire agrees that the Concession Area and all facilities and operations thereon, including but not limited to vendor booths, may be inspected at any time during days and hours of operation by the City Manager or his designee, or by any other Municipal, County, State officer, or agency having responsibilities for inspections of such operations. The Concessionaire hereby waives all claims against the City for compensation for loss or damage sustained by reason of any interference (which interference, if by the City, must be reasonable) with the concession operation by any public agency or official in enforcing their duties or any laws or ordinances. Any such interference (which interference, if by the City, must be reasonable) shall not relieve the Concessionaire from any obligation hereunder.

SECTION 11. INSURANCE.

Concessionaire shall maintain, at its sole cost and expense, the following types of insurance coverage at all times throughout the term of this Agreement.

- a. Comprehensive General Liability in the minimum amount of One Million Dollars (\$1,000,000) per occurrence for bodily injury and property damage. This policy must also contain coverage for premises operations, products and contractual liability.
- b. Workers Compensation Insurance shall be provided as required under the Laws of the State of Florida.
- c. Automobile Insurance for any vehicles used for, or associated with concessionaire's operations shall be provided covering all owned, leased, and hired vehicles and non-ownership liability for not less than the following

limits:

Bodily Injury	\$1,000,000 per person
Bodily Injury	\$1,000,000 per accident
Property Damage	\$1,000,000 per accident

Failure to procure or maintain the required insurance program shall, at the City's discretion, either (i) constitute an automatic default of the Concession Agreement under which the City may, upon written notice to Concessionaire, immediately terminate the Agreement; or (ii) the City, in its sole discretion, may obtain the insurance itself, in which case said insurance shall be charged back to the Concessionaire as provided in the following paragraph.

The policies of insurance referred to above shall not be subject to cancellation or changing coverage except upon at least thirty (30) days prior written notice to the City, and then only subject to the prior written approval of the City Manager or his designee. Prior to the Commencement Date of this Agreement, Concessionaire shall provide City with a Certificate of Insurance for each such policy. ALL POLICIES SHALL NAME THE CITY OF MIAMI BEACH FLORIDA AS AN ADDITIONAL NAMED INSURED. All such policies shall be obtained from companies authorized to do business in the State of Florida with an A.M. Best's Insurance Guide (latest edition) rating acceptable to the City's Risk Manager, and any replacement or substitute company shall also be subject to the approval of the City's Risk Manager. Should Concessionaire fail to obtain, maintain or renew the policies of insurance referred to above, in the required amounts, the City may, at its sole discretion, automatically terminate this Agreement or, in the alternative, deem to obtain such insurance, and any sums expended by City in obtaining said insurance, shall be repaid by Concessionaire to City, plus ten percent (10%) of the amount of premiums paid to compensate City for its administrative costs. If Concessionaire fails to repay City's expenditures within fifteen (15) days of demand, the total sum owed shall accrue interest at the rate of twelve percent (12%) until paid, or, at its option, the City may declare the Agreement in default pursuant to Section 13 herein.

SECTION 12. INDEMNITY.

- 12.1 In consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its agents, servants and employees from and against any claim, demand or cause of action of whatsoever kind or nature arising out of error, omission, or negligent act of Concessionaire, and/or its vendors, agents, servants, employees and/or subcontractors and/or subconcessionaires in the performance of services under this Agreement.
- 12.2 In addition, in consideration of a separate and specific consideration of \$10.00 and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Concessionaire shall indemnify, hold harmless and defend the City, its agents, servants or employees, from and against any claim, demand or cause of action of whatever kind or nature

arising out of any misconduct of Concessionaire, and/or its vendors, agents, servants, employees and/or subcontractors and/or subconcessionaires, not included in the paragraph in the Subsection above and for which the City, its agents, servants or employees are alleged to be liable.

12.3 Subsections 12.1 and 12.2 shall survive the termination or expiration of this Agreement. Subsections 12.1 and 12.2 shall not apply, however, to any such liability, that arises as a result of the willful misconduct or gross negligence of the City, its agents, servants or employees.

12.4 Subrogation.

The terms of insurance policies referred to in Section 11 shall preclude subrogation claims against Concessionaire, the City and their respective officers, employees and agents.

12.5 Force Majeure.

Neither party shall be obligated to perform hereunder and neither party shall be deemed to be in default if performance is prevented by:

- a. fire which renders at least thirty percent (30%) of the Concessionaire's cumulative facilities and operations unusable and which is not caused by negligence of Concessionaire;
- b. earthquake; hurricane; flood; act of God; civil commotion occurring on the Concession Area during or in connection with any event or other matter or condition of like nature; or
- c. any law, ordinance, rule, regulation or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, or war.

12.6 Labor Dispute.

In the event of a labor dispute which results in a strike, picket or boycott affecting the Concession Area or operation described in this Agreement, Concessionaire shall not thereby be deemed to be in default or to have breached any part of this Agreement, unless such dispute shall have been caused by illegal labor practices or violations by Concessionaire of applicable collective bargaining agreements and there has been a final determination of such fact which is not cured by Concessionaire within thirty (30) days.

12.7 Waiver of Loss from Hazards.

The Concessionaire hereby expressly waives all claims against the City for loss or damage sustained by the Concessionaire resulting from fire, water, natural disasters/acts of God (e.g. hurricane, tornado, etc.), civil commotion, riot, or any other Force Majeure contemplated in Subsection 12.5 and Labor Dispute in Subsection 12.6 above, and the Concessionaire hereby expressly waives all rights, claims, and demands against the City and forever releases and discharges the City of Miami Beach, Florida, from all demands, claims, actions and causes of action arising from any of the aforesaid causes.

SECTION 13. DEFAULT AND TERMINATION.

Subsections 13.1 through 13.3 shall constitute events of default under this Agreement. An event of default by Concessionaire shall entitle City to exercise any and all remedies described as City's remedies under this Agreement, including but not limited to those set forth in Subsection 13.4. An event of default by City shall entitle Concessionaire to exercise any and all remedies described as Concessionaire's remedies under this Agreement, including but not limited to those set forth in Subsection 13.5.

13.1 Bankruptcy.

If either the City or Concessionaire shall be adjudged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of either party shall be appointed, or if any receiver of all or any part of the business property shall be appointed and shall not be discharged within sixty (60) days after appointment, or if either party shall make an assignment of its property for the benefit of creditors, or shall file a voluntary petition in bankruptcy, or insolvency, or shall apply for reorganization or arrangement with its creditors under the bankruptcy or insolvency laws now in force or hereinafter enacted, Federal, State, or otherwise, or if such petitions shall be filed against either party and shall not be dismissed within sixty (60) days after such filing, then the other party may immediately, or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.2 Default in Payment.

In the event Concessionaire fails to submit any payment within five (5) days of its due date, there shall be a late charge of \$50.00 per day for such late payment, in addition to interest at the highest rate allowable by law (currently 12% per annum). If any payment and accumulated penalties are not received within fifteen (15) days after the payment due date, and such failure continues three (3) days after written notice thereof, then the City may, without further demand or notice, terminate this Concession Agreement without being prejudiced as to any remedies which may be available to it for breach of contract.

13.3 Non-Monetary Default.

In the event that Concessionaire or the City fails to perform or observe any of the covenants, terms or provisions under this Agreement, and such failure continues thirty (30) days after written notice thereof from the other party hereto, such non-defaulting party may immediately or at any time thereafter, and without further demand or notice, terminate this Agreement without being prejudiced as to any remedies which may be available to it for breach of contract. In the event that a default is not reasonably susceptible to being cured within such period, the defaulting party shall not be considered in default if it shall, within such period, commence with due diligence and dispatch to cure such default and thereafter completes with dispatch and due diligence the curing of such default, but in no event shall such extended cure period exceed ninety (90) days from the date of written notice thereof. In the event Concessionaire cures any default pursuant to this Subsection, it shall

promptly provide City with written notice of same.

13.4 City's Remedies for Concessionaire's Default.

If any of the events of default, as set forth in this Section 13, shall occur, the City may, after notice (if required) and the expiration of cure periods (as provided above), at its sole option and discretion, institute such proceedings as in its opinion are necessary to cure such defaults and to compensate City for damages resulting from such defaults, including but not limited to the right to give to Concessionaire a notice of termination of this Agreement. If such notice is given, the term of this Agreement shall terminate upon the date specified in such notice from City to Concessionaire. On the date so specified, Concessionaire shall then quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.7. Upon the termination of this Agreement, all rights and interest of Concessionaire in and to the Concession Area and to this Agreement, and every part thereof, shall cease and terminate and City may, in addition to any other rights and remedies it may have, retain all sums paid to it by Concessionaire under this Agreement. In addition to the rights set forth above, City shall have the rights to pursue any and all of the following:

- a. the right to injunction or other similar relief available to it under Florida law against Concessionaire; and or
- b. the right to maintain any and all actions at law or suits in equity or other proper proceedings to obtain damages resulting from Concessionaire's default.

13.5 If an event of default by the City, as set forth in this Section 13, shall occur, the Concessionaire may, after notice (if required) and the expiration of the cure periods (as provided above), at its sole option and discretion, terminate this Agreement upon written notice to the City and/or sue for damages. Said termination shall become effective upon receipt of a written notice of termination by the City, but in no event shall Concessionaire specify a termination date that is less than sixty (60) days from the date of the written termination notice. On the date specified in the notice, Concessionaire shall quit and surrender the Concession Area to City pursuant to the provisions of Subsection 13.7.

13.6 Termination for Convenience/Partial Termination.

13.6.1 Notwithstanding the provisions of this Section 13, this Agreement may be terminated by the City, for convenience and without cause, upon the furnishing of thirty (30) days prior written notice to Concessionaire.

Conversely, this Agreement may be terminated by the Concessionaire, for convenience and without cause, upon the furnishing of thirty (30) days prior written notice to City.

13.6.2 Concessionaire acknowledges that the City may develop a schedule

of capital improvements for the right-of-way, including all or a portion of the Concession Area, which may entail a closure of all or a portion of the right-of-way and Concession Area, at the City Commission's sole discretion. In the event that the City closes down the right-of-way, or any other portion of the Concession Area, for the purpose of undertaking a capital improvement plan thereon, then the parties agree that that portion of the Agreement referencing said individual Concession Area shall be partially terminated for convenience, without cause and without penalty to either party, and only as to that portion of the Concession Area which has been closed. Such a termination shall become effective upon thirty (30) days prior written notice to Concessionaire.

13.6.3 In the event of termination or partial termination by City of the Agreement pursuant to this Subsection, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants and employees (including, but not limited to, claims for interference in business or damages for interruption of services or interference in its concession operations by Concessionaire or its vendors). However, if it is determined, via a contract year end-review, that a partial termination results in a substantial decrease to the estimated gross revenues derived by the Concessionaire, then Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the percentage of Concession Area that was partially terminated and for the period of time of said partial termination.

13.6.4 In the event of termination for convenience by Concessionaire pursuant to Subsection 13.6.1, Concessionaire herein acknowledges and agrees that it shall not have any claim, demand, or cause of action of whatsoever kind or nature, against the City, its agents, servants and employees. Moreover, Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the period of time of remaining on the currently remaining term of this Agreement.

13.7 Surrender of Concession Area.

At the expiration of this Agreement, or in the event of a partial termination or termination of the entire Agreement, Concessionaire shall surrender the Concession Area (or portion thereof in the event of a partial termination) in the same condition as the Concession Area was prior to the commencement of this Agreement, reasonable wear and tear excepted. Concessionaire shall remove all its facilities, equipment, fixtures, personal property, etc. upon two (2) hours written notice from the City Manager or his designee unless a longer time period is agreed to by the City. Concessionaire's obligation to observe or perform this covenant shall survive the expiration or other termination of this Agreement. Continued occupancy of the Concession Area (or portion thereof) after termination (or partial termination) of the Agreement

shall constitute trespass by the Concessionaire, and may be prosecuted as such. In addition, the Concessionaire shall pay to the City one thousand dollars (\$1,000) per day as liquidated damages for such trespass and holding over.

SECTION 14. PERFORMANCE BOND OR ALTERNATE SECURITY.

Intentionally Omitted.

SECTION 15. ASSIGNMENT.

Except as otherwise provided in this Subsection, or in the Agreement, Concessionaire shall not assign, sublease, grant any concession or license, permit the use of by any other person other than Concessionaire, or otherwise transfer all or any portion of this Agreement and/or of the Concession Area (all of the forgoing are herein after referred to collectively as "transfers"), without the prior written consent of the City.

Concessionaire shall notify the City Manager or his designee of any proposed transfer, prior to consummation of same and the City or the City Manager or his designee, as applicable, shall respond within thirty (30) days. In the event that any such transfer is approved, the transferee shall agree to be bound by all the covenants of this Agreement required of the transferor hereunder. Any transfer made without complying with this Section shall be null, void, and of no effect and shall constitute an act of default under this Agreement. Notwithstanding any such consent, or any permitted transfer under any provision of this Section, unless expressly released by the City, Concessionaire shall remain jointly and severally liable (along with each approved transferee, who shall automatically become liable for all obligations of the transferor hereunder with respect to that portion of the Agreement so transferred), and the City shall be permitted to enforce the provisions of this Agreement directly against Concessionaire or any transferee of the Concessionaire without proceeding in any way against any other person.

For purposes of this Section 15, Concessionaire's selection of vendors for the Market shall not be deemed a transfer.

SECTION 16. SPECIAL EVENTS.

- 16.1 Concessionaire's proposed uses, as set forth in Section 3 herein, do not contemplate the production, promotion or sponsorship by the Concessionaire of special events in any portion of the Concession Area. In the event Concessionaire does produce, promote or sponsor a special event in the Concession Area, it shall abide by the City's Special Events Permit Requirements and Guidelines. For any use, other than those provided for in this Agreement, a Special Events Permit may be required and shall be obtained through the City's Department of Tourism and Cultural Development. The City Manager's authorization must be obtained for any such special event.

The City Administration shall evaluate requests for Special Events Permits on a case by case basis, in accordance with the City's Special Event Permit Requirements and Guidelines.

In the event that a special event and/or film permit is requested by an entity, other than the Concessionaire, and the proposed special event and/or film production is scheduled to occur within all or a portion of the Concession Area, the Concessionaire agrees to cooperate with the City and the special event permit applicant to allow use of the Concession Area during the period of the special event, including set-up and break-down time.

16.2

City Special Events.

Notwithstanding Subsection 16.1 above, and in the event that the City, at its sole discretion, deems that it would be in the best interest of the City, the City reserves the right to displace the Concessionaire for City produced special events and/or other City produced productions. In such cases, the City may request that the Concessionaire cease and desist operations during the term of, and in the area of, the special event and/or production, and the Concessionaire shall cease and desist during said term. In the event that it is determined, via a contract year end-review, that ceasing and desisting of concession operations, as stated herein, results in a decrease to the estimated gross revenues derived by the Concessionaire, then Concessionaire's MG amount due to the City, pursuant to Section 4.3, shall be reduced proportionately equal to the percentage of reduced hours of operation caused by said special event and/or production. If the Concessionaire is not required to close, or chooses to remain open without interference to the special event and/or production, Concessionaire agrees to cooperate with the City. If the Concessionaire is allowed to remain open during special events and/or productions, the Concessionaire may be allowed to have in operation its normal daily complement of facilities and vendors. "Normal" shall be defined as facilities and vendors, as approved by the City, that the Concessionaire has available for the public on a normal business day. Such facilities and vendors shall not be increased or altered during special events and/or productions without the prior written permission of the City Manager or his designee. To the extent that the normal business day complement of facilities and vendors is displaced by the special event and/or production, the Concessionaire may reallocate such displaced facilities and vendors on a pro-rata basis within an area of the Concession Area not being utilized by the special event and/or production.

For purposes of this Section 16, "normal business day" shall be defined as set forth in Section 9 herein, entitled "Schedule of Operations".

16.3

Notwithstanding anything to the contrary, if a special event occurs in all or any portion of any Concession Area, Concessionaire shall not be liable for any charge, fee or other expense, governmental or otherwise, in connection with such special event.

16.4

Street Vendors / Street Performers.

Any locations within the Concession Area identified by the City for non-Concessionaire sponsored street vendors and/or street performers, in accordance with City of Miami Beach Ordinance No. 2002-3366, as may be amended from time to time, or otherwise in accordance with the City's

respective rules, regulations, and guidelines associated therewith, as same may also be amended from time to time, are excluded from this Agreement, and Concessionaire shall not interfere or otherwise prohibit said street vendors and/or street performers' activities upon such designated portions of the public right-of-way. Similarly, Concessionaire shall not prohibit or otherwise interfere with the activities of any street vendors and/or street performers who may not be part of a City of Miami Beach permitted process, but who may have certain constitutionally protected rights to perform and/or offer for sale their wares on public rights-of-way.

SECTION 17. NO IMPROPER USE.

The Concessionaire will not use, nor suffer or permit any person to use in any manner whatsoever, the Concession Area, operations, or facilities for any improper, immoral or offensive purpose, or for any purpose in violation of any Federal, State, County, or Municipal ordinance, rule, order or regulation, or of any governmental rule or regulation now in effect or hereafter enacted or adopted. The Concessionaire will protect, indemnify, and forever save and keep harmless the City, its agents, employees and contractors from and against damage, penalty, fine, judgment, expense or charge suffered, imposed, assessed or incurred for any violation, or breach of any law, ordinance, rule, order or regulation occasioned by any act, neglect or omission of the Concessionaire, its vendors, employees, agents, and/or subcontractors regarding the Concession. In the event of any violation by the Concessionaire, or if the City or its authorized representative shall deem any conduct on the part of the Concessionaire, its vendors, agents, employees and/or subcontractors, to be objectionable or improper, the City shall have the option, at its sole discretion, to either (i) automatically terminate the Agreement, upon prior written notice to Concessionaire, or to (ii) suspend the concession operations should the Concessionaire fail to correct any such violation, conduct, or practice to the satisfaction of the City within twenty-four (24) hours after receiving written notice of the nature and extent of such violation, conduct, or practice, and such suspension shall continue until the violation is cured. The Concessionaire further agrees not to commence operations during the suspension until the violation has been corrected to the satisfaction of the City.

SECTION 18. PRICE SCHEDULES.

Intentionally Omitted.

SECTION 19. NOTICES.

All notices from the City to the Concessionaire shall be deemed duly served upon receipt, if mailed by registered or certified mail with a return receipt to the Concessionaire at the following address:

Ms. Claire Tomlin
The Market Company
428 Espanola Way
Miami Beach, Florida 33133

All notices from the Concessionaire to the City shall be deemed duly served upon receipt, if mailed by registered or certified mail, return receipt requested, to the City of Miami Beach at the following addresses:

City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

The Concessionaire and the City may change the above mailing address at any time upon giving the other party written notification. All notices under this Concession Agreement must be in writing.

SECTION 20. LAWS.

20.1 Compliance.

Concessionaire shall comply with all applicable City, Miami-Dade County, State, and Federal ordinances, statutes, rules and regulations, including but not limited to all applicable environmental City, County, State, and Federal ordinances, statutes, rules and regulations.

20.2 Governing Law.

This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Florida. In case of any inconsistency between the terms of this Agreement, and any applicable general or special law, said general or special law shall govern, unless otherwise provided herein.

20.3 Equal Employment Opportunity.

Neither Concessionaire nor any affiliate of Concessionaire performing services hereunder, or pursuant hereto, will discriminate against any employee or applicant for employment because of race, creed, sex, color, national origin, sexual orientation, and disability, as defined in Title I of ADA. Concessionaire will take affirmative steps to utilize minorities and females in the work force and in correlative business enterprises.

20.4 No Discrimination.

The Concessionaire agrees that there shall be no discrimination as to race, sex, sexual orientation, color, creed, national origin, familial status, religion or handicap, in its employment practice or in the operations referred to by this Concession Agreement; and further, there shall be no discrimination regarding any use, service, maintenance, or operation within the Concession Area. All concession operations and services offered shall be made available to the public, subject to the right of the Concessionaire and the City to establish and enforce rules and regulations to provide for the safety, orderly operation and security of the operations and the facilities.

- 20.4.1 Pursuant to Sections 62-90 and 62-91, of Chapter 62, of the Miami Beach City Code entitled "Human Relations", Concessionaire, by executing this Agreement, certifies that it does not discriminate in its membership or policies based on race, color, national origin, religion, sex, sexual orientation, familial status or handicap.

SECTION 21. MISCELLANEOUS.

- 21.1 No Partnership.
Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the City and Concessionaire.
- 21.2 Modifications.
This Agreement cannot be changed or modified except by agreement in writing executed by all parties hereto. Concessionaire acknowledges that no modification to this Agreement may be agreed to by the City unless approved by the Mayor and City Commission except where such authority has been expressly provided herein to the City Manager or his designee.
- 21.3 Complete Agreement.
This Agreement, together with all exhibits incorporated hereto, constitutes all the understandings and agreements of whatsoever nature or kind existing between the parties with respect to Concessionaire's operations, as contemplated herein.
- 21.4 Headings.
The section, subsection and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.
- 21.5 Binding Effect.
This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.
- 21.6 Clauses.
The illegality or invalidity of any term or any clause of this Agreement shall not affect the validity of the remainder of the Agreement, and the Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein unless the elimination of such provision detrimentally reduces the consideration that either party is to receive under this Agreement or materially affects the continuing operation of this Agreement.
- 21.7 Severability.
If any provision of this Agreement or any portion of such provision or the application thereof to any person or circumstance shall be held to be invalid or unenforceable, or shall become a violation of any local, State, or Federal laws, then the same as so applied shall no longer be a part of this Agreement but the remainder of the Agreement, such provisions and the application thereof to other persons or circumstances, shall not be affected thereby and this Agreement as so modified shall.
- 21.8 Right of Entry.
The City, at the direction of the City Manager, shall at all times during days and hours of operation, have the right to enter into and upon any and all

parts of the Concession Area for the purposes of examining the same for any reason relating to the obligations of parties to this Agreement.

21.9 Not a Lease.

It is expressly understood and agreed that no part, parcel, building, facility, equipment or space is leased to the Concessionaire, that it is a concessionaire and not a lessee; that the Concessionaire's right to operate the concession shall continue only so long as this Agreement remains in effect.

21.10 Signage.

Concessionaire shall provide, at its sole cost and expense, any required signs at its concessions. All advertising, signage and postings shall be approved, in writing, by the City in its proprietary capacity, and shall be in accordance with all applicable Municipal, County, State and Federal laws and regulations. Any signage posted by Concessionaire on its facilities and equipment shall be subject to the prior approval of the City as to size, shape and placement of same.

21.11 Use of the Right-of-Way.

The right-of-way is for the use and enjoyment of the public and the public's right to such use shall not be infringed upon by any activity of the Concessionaire. Upon execution of this Agreement, Concessionaire acknowledges that all of the rights-of-way within the Concession Area are public, and as such, concession operations must not restrict, or appear to restrict, access to the general public, or in any way limit the public nature or ambiance of the adjacent area. The Concessionaire will conduct its operations so as to maintain a reasonably quiet and tranquil environment for the adjacent area, and make no public disturbances.

21.12 Conflict of Interest.

Concessionaire shall perform its services under this Agreement and conduct the concession operations contemplated herein, in a manner so as to show no preference for other concession operations/facilities owned, operated, managed, or otherwise controlled by Concessionaire with regard to its responsibilities pursuant to this Concession Agreement.

21.13 Reasonableness.

Notwithstanding anything to the contrary in this Agreement, including but not limited to references to "sole option" or "sole discretion" or words of similar meaning, in each instance in which the approval or consent or other action of the City Commission or the City Manager or his designee is allowed or required in this Agreement, such approval, consent or other action shall not be unreasonably withheld, conditioned or delayed.

21.14 Procedure for Approvals and/or Consents.

Intentionally Omitted.

- 21.15 No Waiver.
No waiver of any covenant or condition of this Agreement by either party shall be deemed to imply or constitute a waiver in the future of the same covenant or condition or of any other covenant or condition of this Agreement.
- 21.16 No Third Party Beneficiary.
Nothing in this Agreement shall confer upon any person or entity, including, but not limited to subconcessionaires, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies by reason of this Agreement.
- 21.17 Attorneys' Fees.
If it becomes necessary for City or Concessionaire to enforce their respective rights under this Agreement or any part hereof through litigation, Concessionaire and City agree that the prevailing party shall be entitled to recover from the other party all costs and expenses of such litigation, including a reasonable attorneys' fee and costs, for all trial and appellate proceedings.

SECTION 22. LIMITATION OF LIABILITY.

The City desires to enter into this Agreement only if in so doing the City can place a limit on its liability for any cause of action for breach of this Agreement, so that its liability for any such breach never exceeds the sum of \$10,000.00. Concessionaire hereby expresses its willingness to enter into this Agreement with a \$10,000.00 limitation on recovery for any action for breach of contract. Accordingly, and in consideration of the separate consideration of \$10.00, the receipt of which is hereby acknowledged, the City shall not be liable to Concessionaire for damages to Concessionaire in an amount in excess of \$10,000.00, for any action for breach of contract arising out of the performance or non-performance of any obligations imposed upon the City by this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of limitation placed upon the City's liability as set forth in Florida Statutes, Section 68.28.

SECTION 23. VENUE.

This Agreement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any and all the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Miami-Dade County, Florida. **CITY AND CONCESSIONAIRE HEREBY KNOWINGLY AND INTENTIONALLY WAIVE THE RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING THAT CITY AND CONCESSIONAIRE MAY HEREIN AFTER INSTITUTE AGAINST EACH OTHER WITH RESPECT TO ANY MATTER ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE CONCESSION AREA(S).**

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed and their seals to be affixed, all as of the day and year first above written, indicating their agreement.

PASSED AND ADOPTED THIS _____, 2004.

Attest:

CITY OF MIAMI BEACH

CITY CLERK

MAYOR

Witness:

THE MARKET COMPANY, INC.

Signature

Name and Title of Signatory

JMG/CMC/JD/rlr

F:\DDHP\ALL\ASSET\Markets\Normandy\Isle\NormandyVillageConcessionAgreement.Final.doc

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION

Darden 3/12/04
City Attorney Date

EXHIBIT 2.0

(Page 1 of 2)
Site Plan

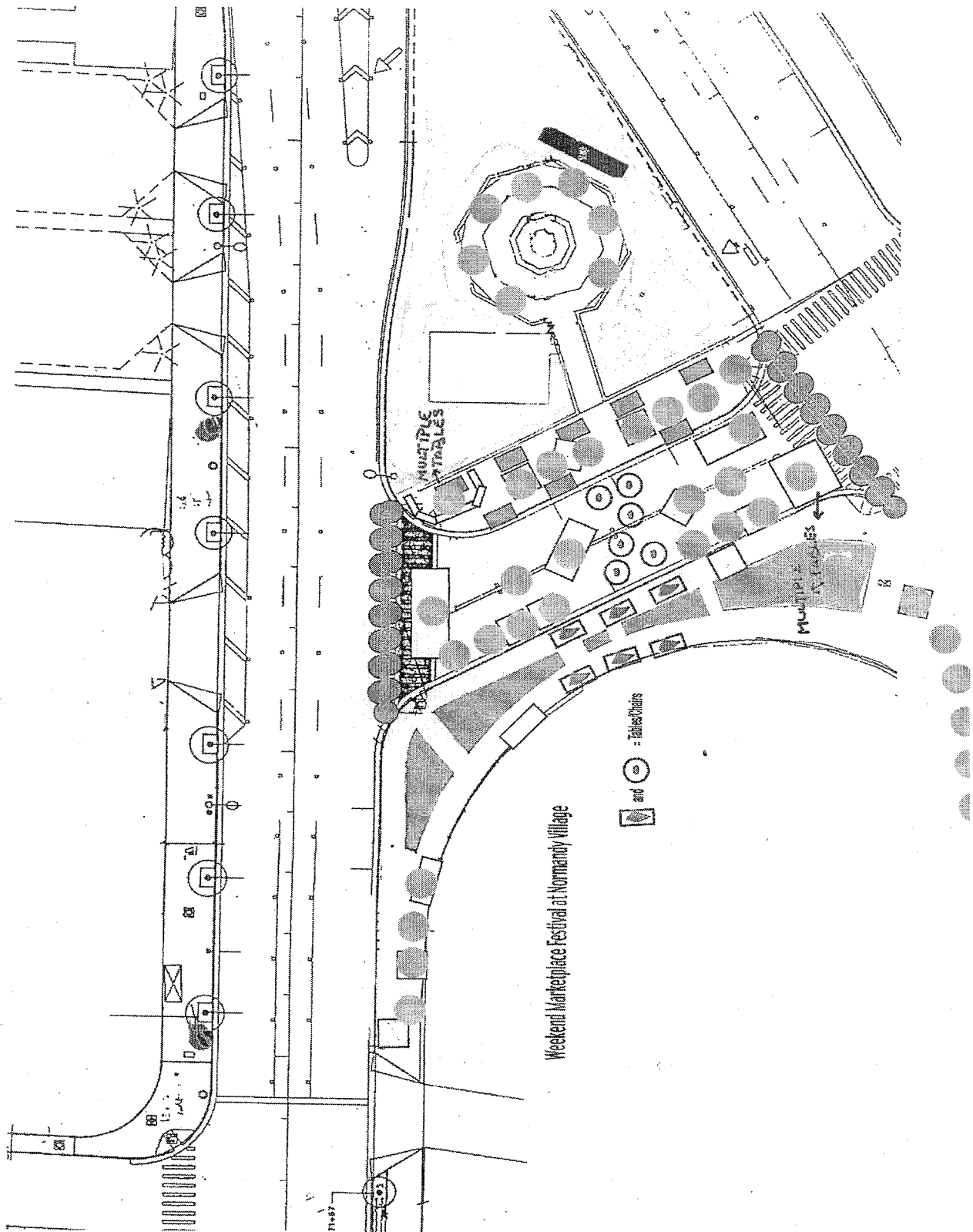


EXHIBIT 2.0

(Page 2 of 2)

PENDING FIRE DEPARTMENT

EXHIBIT 3.1

(Rental Fee Schedule)

PENDING CONCESSIONAIRE

EXHIBIT 3.1.1

(Facilities Design)

EXHIBIT 3.1.2.1

(Page 1 of 2)

(Special Events Disability Access Punch List)

Special Events Disability Access Punch List

1. Ensure curb cuts and cross walks are kept free and clear for usage, with a continuous accessible route of 44 inches in width.
2. The Event Producer must ensure that any nearby accessible on- or off-street parking ("handicapped parking") is not obstructed by vehicles loading/unloading equipment, etc. If such obstructions occur, the Event Producer must see that such obstructions are removed immediately. Accessible parking spaces shall be connected to the site's continuous accessible route, with no obstructions between the accessible parking spaces and the curb ramps that serve those spaces.
3. Any and all accessible routes created and/or installed by the Event Producer, or under the Event Producer's supervision, must have no abrupt change in level in excess of $\frac{1}{4}$ inch. Where such changes in level are present, properly bevel the change in level at a 1:2 ratio or provide a ramp with a slope not to exceed a 1:12 ratio. This is necessary to allow passage of wheelchairs or strollers and prevent tripping or the catching of walkers and canes. Any ramps provided must be in compliance with all Florida Accessibility Code requirements, including, but not limited to, requirements regarding edge protection, handrails, and surface.
4. Provide a smooth transition between temporary pathways and any ramps, sidewalks, streets, or parking lots. This means no change in level exceeding $\frac{1}{4}$ inch. Any change exceeding $\frac{1}{4}$ inch requires beveling at a 1:2 ratio or the installation of a ramp with a slope not to exceed a 1:12 ratio. Any ramps provided must be in compliance with all Florida Accessibility Code requirements, including, but not limited to, requirements regarding edge protection, handrails, and surface.
5. All cashier counters (counters where money transactions occur) must be no higher than 36 inches maximum above finish floor, for a minimum length of 36 inches.
6. Maintain an accessible route for access to merchandise that is both within a vendor space, as well as merchandise not contained within a vendor space. If the overflow of merchandise for patron viewing is placed behind a booth, then provide adjacent access to the merchandise via a curb ramp, as well as the placement of a pathway with a stable and firm surface necessary for the use of wheelchairs and mobility aids.
7. Merchandise for display should be within a line of sight no higher than 48 inches for persons of short stature or wheelchair users. If merchandise is

EXHIBIT 3.1.2.1

(Page 2 of 2)

(Special Events Disability Access Punch List)

displayed higher than 48 inches, merchant must provide assistance to disabled customers in order to reach items.

8. All vendor spaces shall be located on an accessible route that is a minimum of 44 inches wide.
9. If tables and seating are provided for the consumption of food, all aisles adjacent to accessible fixed seating shall provide 30 inch by 48 inch clear floor space for wheelchairs. Where there are open positions along both sides of such aisles, the aisles shall be not less than 52 inches wide.
10. For wheelchair seating spaces provided at tables or counters, knee spaces at least 27 inches high, 30 inches wide, and 19 inches deep shall be provided. The tops of accessible tables and counters shall be from 28 inches to 34 inches above the finish floor or ground.
11. Where food or drink is served at counters exceeding 34 inches in height for consumption by customers seated on stools or standing at the counter, a portion of the main counter which is 60 inches in length minimum shall be provided in compliance with the requirements of Items #9 and #10 above, or service shall be available at accessible tables within the same area.
12. Where portable toilets are provided, an accessible route shall be provided to the toilets. Five percent of the total number of toilets must be accessible. If clusters of portable toilets are distributed throughout the site, then each cluster must have accessible units.
13. If general assembly seating or standing space is provided for audience members attending a public performance at a special event, reserved wheelchair seating must be provided. Such seating must be provided in a location that allows wheelchair users an unobstructed line of sight to the stage. If seating capacity accommodates greater than 300 persons, then accessible seating shall be dispersed throughout the venue.

EXHIBIT 3.2.1

(Product List)

PENDING CONCESSIONAIRE

EXHIBIT A

(Page 1 of 6)
(Vendor Guidelines)

The Market Company, Inc.
428 Española Way - Miami Beach, FL 33139
(305) 531-0038 t. - (305) 532-0082 f.

Vendor Guidelines

Definition of Vendor: All persons participating in a market. Merchants who own stores and participate in a market are also vendors and must follow vendor guidelines.

Market Location:

☐ Lincoln Road ☐ Espanola ☐ North Beach ☐ FestivArt ☐ Other _____

Market Days:

☐ Friday ☐ Saturday ☐ Sunday ☐ Monday

Market Hours:

_____ a.m. to _____ p.m. Sales stop at closing time.
or: _____ p.m. to _____ a.m. Sales stop at closing time.

Market Set-up:

as early as: _____ a.m. Street must be clear by _____ p.m.
or: _____ p.m. Street must be clear by _____ a.m.

The Market Company has a permit with the City of Miami Beach which designates set-up and break-down times. It is imperative that vendors follow these time guidelines. Vendors who do not follow the guidelines will be fined \$50 for the first offense, \$100 for the second offense and thereafter will not be allowed to return to the market.

Fee: \$ _____ + Sales Tax: \$ _____ + Insurance: \$ _____ = Total: \$ _____

Market Fees: Market fees must be paid in advance by the close of the day on the Thursday before the market is to be held. Fees can be paid in cash, check or credit card (automatic credit card deductions can be arranged). Payment is made at The Market Company office at 428 Española Way. This payment guarantees a reserved space in the market. If a vendor cannot attend a market for which payment has been made, cancellation made 48 hours in advance will transfer paid funds to the next market date. Funds will be forfeited if cancellation is not made.

Vendors who do not pay in advance but choose to come and obtain an unreserved space will pay prior to set up and will be assigned a space on a first come first served basis determined by the number of spaces available.

Markets Operate Rain or Shine. If a vendor elects to set up for product sales, even if rain reduces sales, a minimum fee of 50% will be charged. In the case of advanced payment, if a vendor questions whether a market will be set up due to rain, he should call the market coordinator to protect his funds.

Vendor Spaces are Assigned by The Market Company: Vendors are expected to attend each weekend. If a vendor misses two market days without notice his assigned space will be forfeited and he will re-apply for a market space.

EXHIBIT A

(Page 2 of 6)
(Vendor Guidelines)

Additional Markets: Vendors are welcomed to participate in multiple markets. For a vendor to be eligible to be in additional markets he must be prepared to stay in his original marketplace and apply to the additional markets.

Vendor Display Area: Vendors furnish their own tents, umbrellas, tables, cloths, carts, chairs, displays, trash cans, brooms and trash bags. Market standards are white 10x10 tents (Instashade, EZUp), green market umbrellas with stands and green table skirts (Dade Towel - 305/751-1284 \$ 3.75 linear foot). Market aesthetics are very important. Describe your area:

Tents and Umbrellas: Vendor's tents and umbrellas must be weighed down immediately after set-up. Immediately following set-up of tables, the table skirts must be installed. Vendors who do not follow these rules will be fined: \$50/first offense, \$100/second offense and thereafter not allowed to participate in a market.

Vendors Who Need Electricity: Vendors who need electricity may make a request to The Market Company representative for access to an approved electrical outlet. Vendors must provide heavy-duty grounded cords and a heavy-duty grounded connector. Cords exposed on the sidewalk or street must be covered with plastic heavy-duty covers and duck-taped in place. Vendors who provide light can use up to 300 watts per 10'x10' booth. If a vendor does not follow the guidelines for the use of electricity, the following fines will be instituted: \$50/first offense, \$ 100/second offense and thereafter the vendor will not be permitted participation.

Vendors Are Allowed A 10'x10' Space: All tables must fit within the 10'x10' space.

Vendor Behavior: Vendors must dress appropriately with shirts on at all times. Alcoholic beverage consumption by vendors is not allowed. Please see Vendor Rules & Regulations.

Vendor Clean-up: Vendors are responsible for removal of all trash related to their stand. They are not to use public trash cans. They are to remove trash from the street. Vendors are advised to bring their own trash receptacle and broom. If a vendor leaves trash he will be fined \$50/first offense. A second offense will cost \$100. Thereafter the vendor will not be allowed to participate in the market.

Vendor Rental Procedure: An appointment must be made with The Market Company to review the guidelines. The Market Company application and agreement must be completed and signed. Upon acceptance vendor will be allowed to participate in the market.

Signs/Pricing: No handwritten signs are allowed. Products must be priced either individually, by basket/crate or on a posted sign. Signs will be on white background only. The Market Company can recommend a sign maker.

State Sales Tax and Food Handling Permits: Vendors must provide The Market Company with a copy of all such licenses required prior to joining the market. In the case of a food handling license, vendors must provide monthly renewal prior to returning to the market. If a vendor does not follow the state guidelines for food handling they must leave the market.

Parking: Following loading/unloading, vendor's vehicles must be removed from loading/unloading area.

EXHIBIT A

(Page 3 of 6)
(Vendor Guidelines)

Agreement with Relevant Associations: The markets are designed as economic development for the area in which they are located. If there is a complaint from a business about a particular vendor selling products that interfere with his business The Market Company may have to ask a vendor to no longer participate in the event.

Lincoln Road, North Beach, Espanola Way and Espanola Way FestivArt and other markets.

Insurance: The Market Company has liability insurance in the amount of \$ 1,000,000 pursuant to permit requirements of the City of Miami Beach. Vendors must provide proof of insurance for their participation in the market which covers property damage, personal injury and product liability in the amount of \$1,000,000. This proof of insurance must accompany vendor's application. Most farm/business policies cover activities at the market. Check with your insurance carrier. If a vendor does not have insurance and cannot provide proof, he will be responsible for paying The Market Company \$ 5.00 each day to cover his property damage and personal injury liability. If he sells edible products which require product liability he will be responsible for paying \$ 8.00 each day which includes property damage, personal injury and product liability. Coverage is up to one million dollars in liability. Each vendor will sign an agreement accepting responsibility for any damages over one million dollars and agrees to hold harmless and indemnify The Market Company, its owners, agents and employees and The City of Miami Beach from any and all liability arising from participation and sales in the market.

EXHIBIT A

(Page 4 of 6)
(Vendor Guidelines)



Miami's Premier Special Events and Festival Company

428 Española Way - Miami Beach, FL 33139 - 305-531-0038

Addendum to the Market Company Vendor Guidelines **Vendor Rules & Regulations**

In order to provide a safe, secure and pleasant environment, The Market Company requests your cooperation in complying with the following vendor rules and regulations:

1. The use of profanity, loud, rude, disruptive or threatening behavior by any vendor or participant in the market is strictly prohibited.
2. Appropriate dress, including shirts and shoes or sandals, must be worn at all times.
3. No booth may be left unattended at anytime.
4. Smoking while manning a booth is strictly prohibited.
5. The playing of loud radios that disturb the pleasant shopping experience is strictly prohibited.
6. Taking unauthorized photographs or videos of vendors or their property is strictly prohibited.
7. The display, selling or soliciting of anything pornographic in nature is strictly prohibited.
8. Possession/consumption of alcoholic beverages and/or illegal substances is strictly prohibited.
9. The carrying of weapon(s) of any kind, possession of any item defined as a weapon, whether illegal or not is strictly prohibited.

I understand and accept the conditions set forth in the Market Company Vendor Guidelines and the Market Company Vendor Rules and Regulations.

Signed: _____ Date: _____

Your cooperation in abiding by the Market Company Vendor Guidelines and Vendor Rules and Regulations is appreciated. The Market Company or its designee, reserves the right to request that those who refuse to comply with the above conditions leave the market immediately.

EXHIBIT A

(Page 5 of 6)
(Vendor Guidelines)



Miami's Premier Special Events and Festival Company

The Market Company, Inc. - 428 Española Way - Miami Beach, Florida 33139

SUBJECT: LETTER OF TERMINATION AS A VENDOR IN THE MARKET.

To Whom It May Concern:

This is to advise you that I,
do hereby resign my right to participate as a vendor in the market(s) presented by
The Market Company, effective immediately, because I have violated the terms of
agreement as set forth in the Vendor Guidelines and Vendor Rules and Regulations.
Such terms were agreed upon in the Last Chance Agreement which I signed on

Sincerely,

EXHIBIT A

(Page 6 of 6)
(Vendor Guidelines)

The Market Company, Inc.

428 Española Way - Miami Beach, FL 33139
(305) 531-0038 t. - (305) 532-0082 f.

APPLICATION & AGREEMENT

Applicant: _____

Address: _____

City: _____ State: _____ ZIP CODE: _____

Business Name: _____ State of Florida Sales Tax #: _____

Phone: _____ E-mail: _____

Fax: _____ Cell: _____

Pager: _____

☐ North Beach ☐ Lincoln Rd ☐ FestivArt ☐ Espanola Way ☐ Other _____

Merchandise to be sold: _____

(Please continue on back of this page if necessary and initial your work).

I hereby agree to sell only such items which are listed on the application. I swear that all information is correct and complete. I hereby affirm that I have read the regulations and policies as outlined and agree to abide by all rules establishes for the operation of the markets. I further acknowledge that I am an independent contractor and take full responsibility for all activities conducted throughout the term of this permit and have property damage, personal injury and product liability insurance in the amount of \$1,000,000 and agree to hold harmless and indemnify The Market Company, its owners, agents and employees, and the City of Miami Beach from any and all liability arising from participation and sales in the market.

Fee: \$ _____ + Tax: \$ _____ + Insurance: \$ _____ = Total \$ _____

Name: _____ Signature: _____

Date: ____/____/____ Approved: _____

Claire Tomlin/The Market Company, Inc.

Note: Violation or falsification of any of the conditions set forth in this legal agreement will result in the immediate and permanent loss of permission to sell any product at a market sponsored by The Market Company, Inc.

EXHIBIT B

(Page 1 of 2)

(USDA Farmers Market Operating Guidelines)

Guidelines

Page 1 of 2

USDA Farmers Market Operating Guidelines

1. **Market Day, Time and Site:** The Market will be held every Friday from 10:00 a.m. to 2:00 p.m. in parking court #9 of USDA located on the corner of 12th Street and Independence Avenue, SW, Washington, D.C. Selling will not begin before 10:00 a.m. and will end promptly at 2:00 p.m. each market day. Due to space restrictions, latecomers will be located at Market Management's discretion. All vehicles must vacate the market site no later than 3:00 p.m.
2. **Producer-Only:** Farmers will only sell products which they grow or produce themselves.
3. **Products To Be Sold:** Fresh, high-quality fruits, vegetables, herbs, honey, jams and jellies, cheese, vinegars, cider, maple syrup, flowers, bedding plants, and potted plants may be available at the Market. Value-added products will be admitted at the discretion of Market Management.
4. **Commitment to Market:** Farmers/vendors must commit to the entire market season and participate on a regular basis. Product availability may limit participants' beginning and ending dates; therefore, a schedule will be developed prior to the start of the market season documenting the farmer/vendor commitment to the Market.
5. **Notification of Attendance:** Farmers/vendors must call within 48 hours of a market day if they cannot attend. Failure to provide proper notification may result in termination of farmer/vendor participation at the market.
6. **Gleaning:** Farmers/vendors must commit to supporting the USDA food gleaning/food recovery initiative in lieu of paying an entrance fee. This commitment requires farmers and vendors to donate surplus food and food products at the end of each market to a local nonprofit organization identified by USDA.
7. **Tax Deductions for Gleaning:** Questions about tax deductions for gleaning should be referred to the Internal Revenue Service or a tax advisor. Receipts for donated foods may be obtained from the receiving nonprofit organization.
8. **Space:** One vehicle is permitted per space; all other vehicles must be removed from the immediate market premises. One space is 16 x 17 feet, and all trucks must fit within that area. (Exception: ice cream vendor)
9. **Signage:** Farmers/vendors must clearly display the name of their farm/business and post prices for all items being sold.
10. **Clean-up:** Farmers/vendors are responsible for cleaning all trash and waste within and

EXHIBIT B

(Page 2 of 2)

(USDA Farmers Market Operating Guidelines)

Guidelines

Page 2 of 2

around their allotted space. Garbage bins are provided on the market site for this purpose.

11. Applications: All new and returning farmers/vendors must complete an application each year listing the types of products to be sold during the season. This helps to correct any changes to a farm/business in the past year and also helps to ensure a good product mix will be offered at the Market.

12. Farm/Business Visits: USDA Farmers Market Management may visit farm/business locations to verify compliance with Market criteria and guidelines. Farmers/vendors should submit a map and directions to their farm/business location along with the Market application.

13. Noncompliance: The U.S. Department of Agriculture reserves the right to refuse acceptance of any vendor or item that is not in keeping with the rules or quality of USDA criteria and guidelines.

VENDOR CERTIFICATION

(Please detach, sign and return this page to USDA Farmers Market Management)

By signing below, I certify that I have read, understand and will adhere to all applicable guidelines as stated in this document. I further understand that should I fail to comply with these specified guidelines, my participation in the USDA Farmers Market could be terminated.

Signature of Farmer/Vendor

Date

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RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A SECOND AMENDMENT TO THE "AMENDED 1996 INTERLOCAL", (AS SAID TERM IS DEFINED IN THE SECOND AMENDMENT) BETWEEN MIAMI-DADE COUNTY AND THE CITY OF MIAMI BEACH

WHEREAS, the Convention Development Tax (CDT) is a three percent tax imposed on transient rentals that is authorized by State statute; and

WHEREAS, the State statute sets forth that two-thirds of the proceeds shall be used to extend, enlarge, and improve the largest existing publicly owned convention center in Miami-Dade County (the two-thirds portion); and

WHEREAS, the two-thirds portion may be utilized for other eligible purposes, as provided in the statute, including stadiums, exhibition halls, arenas etc.; and

WHEREAS, on June 21, 2006, the City and Miami-Dade County entered into an Interlocal Cooperation Agreement, regarding the disposition of the two-thirds portion of the CDT, which enabled the County to allocate CDT receipts for the construction of the Performing Arts Center (PAC), and also sets forth various other business terms (the 1996 Interlocal); and

WHEREAS, in May 2001, as a result of the expiration of the March 31, 2004 deadline for the construction of the PAC referenced in the 1996 Interlocal, the parties executed Amendment One, dated April 24, 2001 (the First Amendment), which provided, among other things, for the County to make certain payments to Miami Beach, including a \$15 Million payment due December 1, 2003, which has not been paid, and a subsequent payment of \$50 million due on May 1, 2004, if a pledge for the construction of a baseball stadium had not been made by the County by December 1, 2003; and

WHEREAS, on February 4, 2004, the Mayor and City Commission adopted Resolution No. 2004-25484, authorizing the City Attorney and City Manager to institute proceedings under the Florida Government Conflict Resolution Act, pursuant to Chapter 164 of the Florida Statutes, regarding the County's non-payment of the \$15 million; and

WHEREAS, on February 28, 2004, the City and County held the first formal hearing and, at that meeting, the County stated that its non-payment of the \$15 million was based on the lack of available two thirds portion of the CDT receipts, due to prior obligations and commitments; and

WHEREAS, on February 28, 2004, the County also provided a schedule of current CDT receipts and committed expenditures, evidencing lack of available funding for existing obligations, including the \$15 million payment; and

Agenda Item 89F
Date 3-17-04

WHEREAS, since December 2003, the City Administration has been in ongoing discussions with the County Manager to resolve these outstanding disputes; and

WHEREAS, the attached Second Amendment to the Amended 1996 Interlocal (as said term is defined in the Second Amendment) has been negotiated by the parties; approved by the Miami-Dade County Budget and Finance Committee on March 11, 2004; and will be considered by the Board of County Commissioners on March 16, 2004; and

WHEREAS, the attached Second Amendment sets forth the following terms:

- The County will remit a \$15 million payment within ten days of the effective date of the Agreement; and
- All reference to “baseball”, including Paragraph C of the First Amendment, which requires the City’s support of all County and State legislative initiatives related to the financing and development of the baseball stadium project, will be eliminated;
- The County agrees to include a \$55 million Convention Center Expansion Project in its proposed November 2004 General Obligation (G.O.) Bond Program;
- If the County’s G.O. Bond Program is approved, the City will also receive a \$45 million (capped) payment stream from 20% of the South Pointe Tax Increment, commencing October 1, 2005 to September 30, 2016, and continuing to September 30, 2017, at a rate of 45% if the \$45 million cap has not been achieved, with said proceeds to be used by the City for eligible CDT or Municipal Tourist Resort Tax uses;
- If the G.O. Bond Program is not approved by the voters, the City will receive a \$55 million payment stream from 20% of the South Pointe Tax Increment, commencing October 1, 2005 to September 30, 2016, and continuing beyond that date at a rate of 45% if the \$55 million cap has not been achieved, with said proceeds to be used for the expansion or enhancement of the Miami Beach Convention Center;
- Additionally, in either case:
 - All payments referenced above may be pledged by the City as security to fund capital costs, and the County agrees to cooperate with the City in any such bond issuance;
 - The forecasted CDT receipts schedule will remain intact, which has, to date, not realized any payments due to the adverse impact of 9/11 (It is projected, based on new forecasts, that a revenue stream may be realized after 2020);
 - The City agrees to drop the pending claim processed under Chapter 164;
 - The Termination Date has been clarified as the latest of (a) September 30, 2040; (b) the latest expiration of any agreement providing for the pledge of CDT receipts for the PAC; or (c) the latest expiration of any Agreement providing for the pledge of CDT receipts for the baseball stadium. (It is anticipated that the

PAC or baseball stadium financing is likely to last at least 40 years, which could result in an additional 5 year payment stream as contemplated by the terms of the Agreement); and

WHEREAS, in addition to the points identified above, the County Manager has agreed to amend the Redevelopment Agency Interlocal Agreement to address the refinancing of certain existing debt within the City Center Redevelopment District and to address the payment to the County to offset costs associated with the administration of redevelopment agencies and a like payment to the City at fiscal year end; these Amendments would be presented to the Board of County Commissioners and the City Commission, respectively, for consideration at a future meeting; and

WHEREAS, in that the attached Second Amendment authorizes the \$15 million payment to be advanced from non-ad valorem general fund revenues; guarantees the inclusion of the City's Miami Beach Convention Center Expansion Project in the County's 2004 G.O. Bond Program; and provides an additional \$45 million (if the County's G.O. Bond is approved) or \$55 million (if the County's G.O. Bond is not approved) revenue stream from non-ad valorem general revenues over approximately the next 11-12 years, the City Commission should approve the Second Amendment.

NOW, THEREFORE, BE IT DULY RESOLVED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and City Commission hereby approve and authorize the City Manager to execute a Second Amendment to the "Amended 1996 Interlocal" (as said term is defined in the Second Amendment) between Miami-Dade County and the City of Miami Beach.

PASSED and ADOPTED this ____ day of March 2004.

ATTEST:

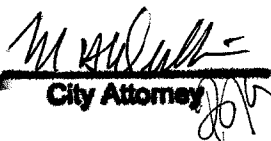
CITY CLERK

MAYOR

JMG/CMC/PDW/rar

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**APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION**



City Attorney

3-15-04

Date